Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM G. PIERCE, P.E.,
Petitioner,

v.

ROBERT REICH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Submitted by:

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68

QUESTIONS PRESENTED FOR REVIEW

I.

Whether Pierce and all private sector employers have been denied "equal protection" because of the Department of Labor's approval and issuance of an exemption to all state and local governments from the "salary basis" requirement governing partial day deductions from salaried exempt employees, while holding private employers liable to a rigid interpretation of labor regulations.

II.

Whether the issue of partial day deductions and the "salary basis" test for otherwise salaried exempt employees, as interpreted by the Department of Labor and the courts, is contrary to the plain language of the governing regulations and the surrounding text.

III.

Whether the Portal to Portal Act of 1947, 29 U.S.C. §251 *et seq.*, enacted by the 80th Congress provides protection for the employers, who acted in "good faith", from liabilities concerning otherwise salaried exempt employees that have received "partial day deductions" and are, per the DOL's interpretation of the labor regulations, automatically converted to hourly non-exempt employees by sole virtue of the partial day deductions.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals were the United States Department of Labor and William G. Pierce.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner William G. Pierce ("Pierce") respectfully requests that the Court grant the Petition for a Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the Sixth Circuit. As discussed below, a review of the issues presented in this case is necessary to ensure the rightful application of the Portal to Portal Act of 1947, the Fair Labor Standards Act ("FLSA"), and subordinate regulations promulgated by the Department of Labor.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is an unpublished decision and is set forth in the Appendix to the Petition ("Pet.App.") A at A1. The Final Judgment by the United States District Court for the Western Division of the Southern District of Ohio is set forth in Pet. App. B at B1. The Findings of Fact, Conclusions of Law, Decision and Order of the United States District Court for the Western Division of the Southern District of Ohio is set forth in Pet. App. C at C1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 20, 1994. Pet. App. A. A petition for rehearing was denied by order of the court dated February 15, 1995. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AMENDMENTS, STATUTE(S) AND REGULATION(S) INVOLVED

The constitutional amendments, statutory and regulatory provisions involved in this case are:

U.S. Constitutional Amendment XIV §1

29 U.S.C. §213
29 C.F.R. §541.118

Portal to Portal Act of 1947
(29 U.S.C. §251 *et seq.*)

STATEMENT OF THE CASE

Petitioner seeks review of a decision and judgment of the United States Court of Appeals for the Sixth Circuit that upheld the decision by the district court reversing its earlier order that originally granted summary judgment to Pierce and dismissed the Department of Labor's (hereafter "DOL", the "Secretary", or the "Department") complaint for back overtime pay for Petitioner's exempt employees. The basis for federal jurisdiction in the district court is 29 U.S.C. §213.

A. Factual Background

Petitioner Pierce is the sole owner of a thirteen year old consulting engineering firm that had 25 employees in three geographical areas in the mid-west region of the country. All of the firm's work involves contracts with private industries manufacturing consumer products and fine chemicals. The employees in question are considered by Pierce to be salaried employees exempt from the minimum wage and overtime provisions of the FLSA by virtue of the exemptions established for managerial and professional employees. The DOL has stated that the backgrounds and job duties of the employees meet the regulatory requirements for such exempt status.

In addition to a complete range of company paid benefits for the employee, spouse, and children, Pierce also had a flextime policy to allow his employees the opportunity to set their own schedule to meet personal and family needs. With the offices opened twelve hours a day for ten days in a normal two week pay period, the employee was able to establish his/her own schedule as long as it did not negatively impact on the needs of the client or co-workers.

Each employee, for billing purposes, was required to complete an individual time sheet in order to account for their time. The time sheets were kept as a project record and appropriately charged to the client. As a matter of internal record keeping, the employees were instructed to account for their time in one of four categories: by project, leave (vacation, holiday, sick), miscellaneous (jury duty, military leave, bereavement, family medical emergencies, etc.), and "office hours" (if no project work was available.)

Inherent with the flextime policy was the expectation that the employee would manage their time in a professional manner and work the hours commensurate with their agreed upon salary. Should personal and/or family needs require time away from work, the employee did not need permission from any manager to leave early or arrive late, nor when to make up any time that may have been missed. If so desired, they had the option to charge such absences to personal leave accounts rather than make the time up at a later date or receive a reduction in pay -- the option was the employee's.

As a matter of fairness to all the salaried exempt employees, overtime hours worked by the employees provided additional compensation at a rate equal to their yearly salary divided by 2080 hours. Since overtime hours were sporadic, dependent on specific phases of a project, and billable to the client, the additional payments were made to the employees so that the "wealth" was shared.

During the course of the audit and subsequent review of the records, it was found that approximately 105 hours out of a total of nearly 70,000 effort hours worked were deducted from employees pay for time the employees chose to leave work and not make up or charge to their vacation leave. The figure represents approximately $3,100 out of a payroll that approached $1,500,000. During the same period,

Pierce provided non-required compensation totaling over $40,000 to the same group of salaried-exempt employees for the extra time spent on the job, even though such compensation was not legally required for salaried employees. The 105 hours the DOL was of the opinion should not have been deducted represents 0.15% of the total hours worked during the audit period, while the $3,100 the deducted hours represented amounted to 0.21% of the approximate payroll. In comparison, the $40,000 in extra compensation paid to the salaried employees represented 2.7% of the approximate payroll for the same audited period.[1]

B. Procedural Background

On January 10, 1989, the Secretary commenced a lawsuit against Pierce alleging that certain employees of Pierce, during the period of June 1, 1986, and May 30, 1988, were not exempt from the overtime provisions of the FLSA and were therefore entitled to additional overtime payments. The determination was based on the Department's interpretation of the "salary basis" test. Pierce filed a response denying that it had violated the overtime provisions of the Act, asserting that the employees in question were exempt administrative and/or professional employees pursuant to 29 U.S.C. §213 and the applicable regulations found at 29 C.F.R. §541.

On March 25, 1992, the United States District Court for the Southern District of Ohio, Western Division, issued "Findings of Fact, Conclusions of Law, Decision and Order", that the employees were determined to be exempt from the

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[1] In other words, Pierce paid his employees in extra compensation ten times the amount of money the DOL was of the opinion should not have been deducted, even though the employee was not willing to work when work was available.

overtime payment provision of the Act subject to the conditions that (1) Pierce reimburse the employees in question for the deductions made, and (2) Pierce promise to comply with the Act in the future. Magistrate Judge Sherman found that the "window of correction" should be made available to Pierce since deductions had never been made due to lack of work, but only when the employees were voluntarily absent for personal reasons, and that Pierce was currently in compliance and had promised to comply in the future.

On February 9, 1993, the court reversed its decision that Pierce's employees were exempt from the overtime provisions of the FLSA because Pierce had not complied with the order to reimburse the employees for the deductions that were made.[2] The subsequent Judgment was that Pierce's employees were not exempt from the overtime provisions of the FLSA, and that Pierce must pay the additional overtime amounts along with interest and court costs.

On March 9, 1993, Pierce, proceeding *pro se*, filed an appeal from the District Court's Final judgment, as did the

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[2] The ultimate reversal of the magistrate judge's decision that Pierce's employees would be covered as exempt employees through the "window of correction" was due solely to Pierce's inability to comply with the order to reimburse employees for the deducted hours. In no way did the financial situation in 1992 reflect the manner in which the employees where treated and compensated in the June 1986 to May 1988 audited period covered by the district trial: the recession of the early 1990's and the distraction and disruption caused by this litigation had taken its toll.

Pierce requested additional time in order to sell his family residence and raise the funds necessary to comply with the magistrate judge's order to reimburse the employees for the deducted hours. In an effort to demonstrate the inability to pay in the Fall of 1992, Pierce offered to "open the books" to an auditor of the court to substantiate his explanation of non-compliance. In the appeal, exhibits were filed that included cover sheets of the foreclosure proceedings on Pierce's family home, Cincinnati office building, eviction notice of the business's Louisville office, and repossession of the office equipment and furniture from both offices in an effort to demonstrate the inability to pay and the financial devastation that resulted from the litigation initiated by the Secretary.

Secretary on April 12, 1993, when the Department filed a cross-appeal. The United States Court of Appeals for the Sixth Circuit, issued an unpublished decision affirming the district court's decision and rejected the arguments raised by both Pierce and the Secretary. The court relied upon *Martin v. Malcolm Pirnie, Inc.* 949 F.2d 611 (2nd. Cir. 1991), wherein the application of the "window of correction" was rejected along with the argument for the "plain meaning" of the regulations.

The Sixth Circuit opinion summarily dismissed the argument that the "Portal to Portal Act of 1947", Public Law 49, 80th Congress (61 Stat. 84), provides protection for the employer for "acts or omissions" occurring in "good faith", and rejected the argument that a temporary financial inability should provide an extension of time in which to pay[3].

On January 4, 1995, Pierce filed a motion for a Rehearing En Banc. That request was denied on February 15, 1995.

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[3] Despite the representation made to the court (see footnote 1, *supra*), it stated that "even had such an extension existed, Pierce provided no evidence of his inability to pay."

REASONS FOR GRANTING THE WRIT

I

Whether Pierce and all private sector employers have been denied "equal protection" because of the Department of Labor's approval and issuance of an exemption to all state and local governments from the "salary basis" requirement governing partial day deductions from salaried exempt employees, while holding private employers liable to a rigid interpretation of labor regulations.

In order to be exempt from the overtime pay provisions of the FLSA, an employee must meet both a duties test, paid a specified minimum amount, and paid on a salary basis. 29 C.F.R. §541.118. The salary basis regulation states, in pertinent part:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.
> 29 C.F.R. §541.118(a).

The salary basis regulation identifies two specific cases regarding deductions and their effect on employment status:

> (1) An employee will not be considered to be "on a salaried basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.
> 29 C.F.R. §541.118(a)(1) (emphasis added).

> (2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.
> 29 C.F.R. §541.118(a)(2).

The Secretary attempted to point out that the public sector employees were not originally included within the scope of the FLSA and as such can easily win exemption with regard to the "salary basis" test. Yet caselaw and subsequent Congressional legislation refute such arguments. In 1985 the Supreme Court issued a ruling with regard to the applicability of the FLSA towards the public sector employees (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)), and Congress supported the position with the November 1985 Amendment

to the FLSA by adding coverage to all employees of State and local governments[4].

On September 6, 1991, the Secretary issued an Interim Final Rule providing public employers (but not applicable to private employers) a retroactive exemption to the "salary basis" test for all exempt employees. The new regulation provided:

> A new §541.5d is being added that provides that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave and, absent the use of paid leave, reduces the employee's pay for absences of less than one workday, will not be disqualified from exemption due to such pay system. This rule also provides that the exemption will not be

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[4] The following is the legislative history of the FLSA as applied to the public sector as compiled by the DOL and stated in its Final Rule issuing an exemption from the "salary basis" test for public employers, as reported at *Federal Register* Vol.57, No. 161, p.37667:

"In 1974, Congress extended coverage to all public sector employees, exempting only elected officials and their immediate staffs. It did so with the stated intent to cover virtually all public sector employees who were not within the scope of the section 13(a)(1) exemption.

"In 1976, however, the U.S. Supreme Court considered the special nature of State and local governments under the FLSA and ruled that the FLSA's minimum wage and overtime pay provisions could not constitutionally be applied to State and local government employees engaged in traditional government activities. (*National League of Cities v. Usery*, 426 U.S. 833 (1976).) The Court expressly overruled Maryland v. Wirtz with regard to the Act's application to public school and hospital employees, but National League did not alter the continued application of FLSA to employees engaged in activities that are not "traditional" functions of government.

"In 1985, the Supreme Court reversed National League in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Court reasoned that sufficient authority existed to apply FLSA to State and local governments under the commerce clause of the Constitution and found that applying Federal regulation based on the distinction between "traditional" and "nontraditional" governmental functions was unsound and unworkable."

> defeated by deductions from salary caused by budget required furloughs[5], which are not regular and recurring, except in the workweek in which such a deduction occurs.

Federal Register Vol.56, No.173, p. 45824 - 45826. The DOL first announced their intention to exempt public sector employers from the regulations pertaining to the FLSA on January 9, 1987. Note that this was just slightly more than one year after Congress amended the FLSA to make public sector employers specifically subject to the same labor laws as applicable to the private sector employers.[6]

The ability for an agency to change policy direction within a regulation and/or the interpretation of a regulation is well documented and a matter that has been upheld by the Court. However, several criteria must be applied to the change in order for the new regulation to be valid. "Thus, when an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act", and, "... the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive." *New York Council, Ass'n of Civ. Tech. v. F.L.R.A.*, 757 F.2d 502, 508 (2d Cir. 1985), citing *Brae Corp. v. United States*, 740 F.2d 1023, 1038 (D.C. Cir. 1984). An agency is also required to explain why a change

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5 It should also be noted that the Secretary went beyond the issue of "partial day deductions" and included "absences occasioned by the employer or by the operating requirements of the business", which is contrary to 29 C.F.R. §541.118(a)(1).

6 Noteworthy also, is the fact that the January 1987 exemption for certain public sector employers, whereby the DOL first recognized and acknowledged that a conflict existed regarding deductions from salaried exempt employees, was nearly one and a half years prior to the Secretary initiating the audit of Pierce.

in policy is necessary: ". . . such a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule." *Id. at 508.*

The explanation provided by the Secretary for initiating the change in position for strictly public employers, while ignoring the issue that is equally pertinent to private employers, was as follows:

> In the meantime, these diverging judicial interpretations and accompanying confusion have developed, resulting in the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined. Such unforeseen liabilities could seriously threaten the fiscal integrity of State and local governmental agencies, and could seriously disrupt widespread pay practices . . .[7]
>
> State and local government jurisdictions have varied pay policies. Some

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[7] Additional rationale in the DOL's Interim Final Rule, as reported at *Federal Register* Vol.56, No.173, p. 45824 - 45826 included:

"...the Department has become aware that few public employers compensate employees in a manner that meets the 'on a salary basis' requirement for exemption under the current regulation.

"Application of the salary basis test to State and local government employees may result in denial of the exemption to thousands of such employees who have been considered exempt by their employers. The Department considers it inappropriate that the public sector employees be denied the exemption because they fail to meet the "on a salary basis" test under pay systems imposed by law, regulation or public policy that was established pursuant to principles of public accountability . . . "

> of these policies are based on constitutional or statutory provisions while others are derived from regulations or policies that have been evolved over the years.

Federal Register Vol.56, No.173, p. 45825 (emphasis added). So too have private sector employers pay regulations and policies evolved over the years. Moreover, a principle reason for granting a public sector exemption was the financial havoc that would befall government if the DOL enforced its regulations against both public and private employers alike. "But there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits." *Alabama Power Company v. Douglas M. Costle,* 636 F.2d 323, 357 (D.C. Cir. 1979).

> The implied authority is not available for a situation where the regulatory function does provide benefit, ... but the agency concludes that the acknowledged benefits are exceeded by the costs. For such a situation any implied authority to make cost-benefit decisions must be based not on a general doctrine, but on a fair reading of the specific statute, its aims and legislative history.

Id. Additionally, "[a]n agency must have the latitude to adopt standards that may evolve over time as long as those standards are consistent with the statute's purpose and are not contrary to law." *Allegheny Elec. Co-op., Inc. v. F.E.R.C.,* 922 F.2d 73, 81 (2nd. Cir. 1990).

Based on the rulings identified above, the Secretary must, yet has failed to, provide conclusive evidence that the policy change for public employers is "consistent with the

law", why the original inclusion of the public employers is no longer required despite the statute having been amended to apply the FLSA to the public sector, how the change improves the administrative policy regarding the "salary basis" test, and was done for reasons other than cost/benefit considerations. In the Final Rule, the Secretary justified creating an exemption contrary to the statute because "Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked, these systems would, solely for the reason, be found to fail to meet the regulatory "salary basis" component of the exemption." *Federal Register*, Vol. 57, No. 161, page 37672 (emphasis added). A regulatory agency does not have the authorization to substitute their judgment nor usurp the legislative authority of Congress so as to defeat the clear and plain language used by Congress, on the presumption that Congress, in amending a statute, did not know what they were doing. If it is to be presumed that the Secretary has met the obligatory requirements and that the exemption may indeed be read into Congressional intent, then the 14th Amendment's "equal protection under the law" provision mandates the Department provides the same exemption for the private employers and their employees.

Therefore, for the Final Rule established by the Secretary on August 19, 1992, to be in harmony with congressional intent, the Department must be interpreting the regulation as allowing for "partial day deductions." However, the DOL has made the interpretation applicable in only certain cases. The issue then becomes in what "certain cases". The Secretary attempts within the Final Rule to establish the "flip-flop" for the "certain cases" regarding public employers and their employees, and does so out of a belief that few State or local governments are currently in compliance, the potential liabilities, and fiscal concern for

the public employers[8]; but in doing so, the DOL ignores the fact that the issues are indistinguishable from those experienced by private employers and in refusing them the same considerations the Department violates the "equal protection" clause for all non-public employers.

The attempted distinction between public and private employers may well not be a valid distinction upon which to discriminate. "[C]oncern for a particularized situation is not grounds for voiding a regulation designed to deal with thousands of cases." *Lugo v. Schweiker,* 776 F.2d 1143, 1150 (3rd. Cir. 1985) *citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 104 S.Ct. 2778, 2793 (1984). Moreover, "[a] further complication arises when, as here, the agency distinguishes earlier cases in which it invoked the rule. ... Those factual differences serve to distinguish the cases only when some legislative policy makes the differences relevant to determining the proper scope of the prior rule". *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade,* 412 U.S. 800, 93 S.Ct. 2307, 2375 (1973). No where in the FLSA can a legitiment inference be drawn that Congress intended for there to be disparate enforcement based on public versus private employers.

The courts have further ruled that "[a]n agency may alter its interpretation of a statute so long as the new rule is consistent with the statute, applies to all litigants, and is supported by a reasoned analysis."*Torrington Extend-A-Care Employee Association v. National Relations Board,* 17 F.3d 580, 589 (2nd. Cir. 1994)(emphasis added). Now the Secretary attempts to establish a difference worthy of distinction for exemption based on the status of the

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[8] The arguments that the Secretary uses closely parallel the justification that Congress stated in the Portal to Portal Act of 1947 when they sought to protect private employers from the same type of litigation. (see Appendix D)

employer: public versus private[9]. However, the legislative policy depends not on the source of revenues or public versus private accounting principles, rather it is based on the duties, responsibilities, and the backgrounds of those executive, administrative, professional, and outside sales employees in question. Was this not part of the reasoning or justification for making public employers specifically within the coverage of the FLSA when Congress amended the statute in 1985! Regardless of the source of the revenues to be spent on payroll, an engineer for a private employer holds the same requirements for advanced knowledge, the same discretionary decision making power, the same project responsibilities, utilizes the same technical experiences including calculations, typically works the same number of hours on a given project, and on the same schedule as the State or local government engineer and accordingly is deserving of the same "equal protection".

For the Secretary to attempt to establish a regulation allowing for partial day deductions for public employers and not private employers is clearly contrary to the rulings and caselaw that a policy change must still meet the intent of Congress, cannot be made just for good intentions, and must not discriminate against a specified group, thus violating their "equal protection under law." Pierce urges the Court to grant the Petition for Writ of Certiorari to hold that, for the

[9] As declared in the explanation of the Department's rule making process at *Federal Register* Vol.57, No.161, p. 37670, the DOL supports its decision to provide a public sector only exemption by stating:

"... certain aspects of the "salary basis" test for distinguishing exempt from nonexempt employees did not serve their intended purpose when applied to the public sector, as aspects of the "salary basis" requirement are unduly restrictive when applied in the public sector. In the Departments view, those aspects are not valid indicators of the *bona fides* of a claimed exemption under section 13(a)(1) in the public sector where every employee may theoretically be subject to potential docking for partial-day absences. State and local governments were thus being inappropriately deprived of the opportunity to apply section 13(a)(1) exemption to their employees who would otherwise be properly exempt."

new regulations to be valid for any group, they must be in harmony with the intent of Congress, and to avoid a conflict with the 14th Amendment they must be applied across the board to all employers providing "equal protection" for the private as well as the public employer.

II.

Whether the issue of partial day deductions and the "salary basis" test for otherwise salaried exempt employees, as interpreted by the Department of Labor and the courts, is contrary to the plain language of the governing regulations and the surrounding text.

The "plain language" of the regulations demand that no partial day deductions may be made from salaried exempt employees when work is not available and the employee is "ready, willing, and able to work." However, over the course of the litigation, Pierce has maintained that deductions can be made when the employee absents him/herself for personal or family needs without charging time off towards accumulated leave regardless of the length of absence since neither the Act nor the regulations provides a definitive time frame for allowable deductions. Given the confusion surrounding the point in time when deductions are permissible, the underlining theme is whether work is available and the employee is "ready, willing, and able" to work. The Department's stand is that the language clearly states that partial day deductions are not permitted under any circumstances.

Several circuits have reviewed the issue of deductions to salaried exempt employees and have reached conflicting results. Some courts have concluded that a salary was not "subject to" deduction where there was no evidence that an employee's pay was ever reduced; that only actual and not "theoretical" deductions could invalidate the salary

basis of compensation; and that rare instances of docking pay for absences of less than a day did not defeat eligibility for exemption except in the workweek in which a deduction was made.[10] Other courts have validated the use of the "window of correction" as a remedial provision within 29 C.F.R. 541.118(a)(6) to preserve the exempt status[11], while still other courts have held that an employee compensated under a plan that allows for deductions to be made when the employee is absent for less than a day is to be declared a non-exempt employee even if such deductions had not occurred.[12] In addition there are numerous conflicts within the district court rulings as well. *See, Federal Register* Vol.57, No. 161, page 37669. These diverging decisions amongst the circuits was one of the reasons the DOL gave for creating the exemption for public employers as discussed in the first question presented for review.

The picture was not so clear for the magistrate judge below, who recognized and acknowledged the conflict, stating: "For purposes of this decision, the Court finds it unnecessary to decide this debate ..." (*See* page C7 in Appendix C). The 6th Circuit's decision below also suggests the presence of disagreement when stating, in contrast to the Secretary's position: "... for the purposes of 29 C.F.R.

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10 See, e.g., *Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800 (11th Cir. 1991).

11 See, e.g., *Hartman v. Arlington County , Va.*, 720 F.Supp. 1227 (E.D. Va. 1989), *aff'd*, 903 F.2d 290 (4th Cir. 1990); *Fire Fighters Local 2141 v. City of Alexandria, Va.*, 720 F. Supp. 1230 (E.D. Va. 1989),*aff'd*, 912 F.2d 463 (4th Cir. 1990)

12 See, e.g., *Absire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2nd. Cir. 1991); *Brock v. Claridge Hotel and Casino*, 846 F.2d 180 (3rd Cir. 1988); *see also, Klien v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993)(Salary exemption was lost for a nurse who was suspended with loss of one half day's pay as disciplinary action for poor job performance).

§541.118(a)(2) and (3), a working day constitutes the standard, eight-hour working day." The court's position not only establishes a "day" as eight hours but also indicates that the regulations specifically identify the length of time with indifference to the specific employment arrangement, such as four ten hour days constituting a workweek.

In the Department's brief to the 6th Circuit Court of Appeals, counsel stated, "The Secretary's position is that the word "day" in §541.118(a)(2) means the employee's customary work day, whatever number of hours that may be." The Secretary's position with regard to litigation against Pierce was obvious, in that counsel argued that "... the dispute is clearly delineated, ... because the Secretary's interpretation of the word "day" comports with the ordinary meaning of the word, ... and is consistent with pertinent regulation ... the Secretary's construction should be upheld." Counsel for the Secretary also argued in their brief that "[f]undamental rules of construction dictate that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.' " (citing *Perrin v. United States,* 444 U.S. 37, 42 (1979)).

The Secretary's position in its case against Pierce is that the issue of a "day" is clear, distinct, and requires no further debate. Yet, to the contrary, after elaborating on the number of different conclusions reached by numerous Circuits and district courts debating the application of the regulations for public employers, the Secretary found the need to develop an exemption for such employers to provide relief from unforeseen liabilities. If the meaning of "day" was not clear for public employers, then it is just as unclear for private employers. The Department's underlying justification requiring the exemption for all public employers was that "... these diverging judicial interpretations and

accompanying confusion have developed, " warranted such action. *Federal Register* Vol.56, No.173, p. 45825.

As the DOL has recognized and acknowledged in their Interim Final Rule exemption for public employers, a significant amount of confusion does exist with the phrase "a day or more", which is the sole reason that both public and private employers have been subject to liabilities stemming from the "salary basis" test. In light of such conflict " . . . it is well-recognized that a court 'cannot concentrate on individual terms and ignore a consideration of the context in which the term appears.' " *Shepherd Oil, Incorporated v. Atlantic Richfield Company*, 734 F.2d 23, 29-30 (Temp. Emergency Court of Appeals 1984) citing *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 719 (Temp. Em. Ct. of Appeals, 1982). *Accord., Campesinos Unidos, Inc. v. United States Department of Labor*, 803 F.2d 1063, 1069 (9th Cir. 1986) ("However, our task is to interpret the regulation as a whole, in light of the overall statutory and regulatory scheme, and not to give force to one phrase in isolation.").

First, a review of the language in the regulation sets the stage for a reasonable interpretation of the "salary basis" test in the context in which it is found by the "reasonable person", wherein it states:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.
> 29 C.F.R. §541.118(a)

> (1) An employee will not be considered to be "on a salaried basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.
> 29 C.F.R. §541.118(a)(1) (emphasis added).
>
> (2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons[13], other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.
> 29 C.F.R. §541.118(a)(2)(emphasis added).

The regulations establish two specific cases for the employer to apply with regard to the criteria necessary for an employee to be salaried and exempt from the FLSA minimum wage and overtime statutes. Those two specific cases are as stated above and are predicated on (1) whether the time spent away from work was caused by the employer or the employee, and (2) whether work was available. The phrase, "[a]ccordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available" (29 C.F.R. §541.118(a)(1)) clearly establishes the original intent of the regulation that would

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[13] As a further indication of the confusion established in the regulations, in the Departments brief to the 6th Circuit, and in response to Pierce's question as to why deductions are allowed for hours in the second day ("for a day or more") but not for the initial day, the Secretary stated "As discussed in the text, clearly the Secretary's construction of the phrase "a day or more" to mean one day or more whole work days is sensible, and is the proper reading...."

prevent an employer from playing both sides of the fence in declaring an employee exempt for overtime purposes, but non-exempt by requiring non-paid time off to satisfy the business needs during periods of lack of work.

In an absence of a definitive idea of what is meant by "a day", the reasonable person must rely on the interpretations that can be derived from the preceding and ensuing paragraphs of the regulations and from established customs.[14] The previous paragraphs establish that the employee must not receive deductions from pay due to the quantity or quality of work performed, must be "ready, willing, and able to work", and can not receive deductions for a time when no work is available. Subsequent paragraphs state that the employee must be compensated with their usual pay for jury duty, attendance as a witness, or temporary military leave (29 C.F.R. §541.118 (a)(4)), and deal with the construction of permissible deductions for "infractions of safety rules of major significance." (29 C.F.R. §541.118 (a)(5)). It is not disputed that Pierce complied with all of these requirements.

The paragraph in question, 29 C.F.R. §541.118 (a)(2), does allow for an employer to make a deduction when two specific criteria are met: 1) the employee absents him/herself, and 2) the absence does not cover illness or accident. The criteria of a "day" falls into the chasm of ambiguity in that the term is neither defined in the law nor within the regulations and thus left to the interpretation of

[14] The phrase of "a day or more" has been in the regulation governing executive, administrative, and professional employees since its inception, yet until a change in policy (without prior notice given) was made in 1988, there had been no prior challenge to an employee's exemption classification based on the "salary basis" test. In the suit against Pierce, the oldest established caselaw pertaining to the "salary basis" test that was cited was 1990, whereas the audit period was from June 1986 to May 1988. Thus, there were no reported cases extant interpreting "a day or more" from which Pierce could be said to be on notice of the Department's interpretation.

the "reasonable person" and the legislative intent of the statute[15].

It is axiomatic that " ... contemporaneous expressions of opinion by low-ranking officials are highly relevant and material evidence of general understanding of ambiguous regulatory provisions." C.J.S. Public Administrative Law and Procedure §95 (1985). Such an indication can be derived from a pre-recorded message that is heard on the phone at the Cincinnati Field Office of the Wage and Hour Division of the Department of Labor. It states, "The Act does not require any payment for vacations, sick days, holidays, or any other days or hours not worked on the job." (see full text in Appendix E - emphasis added).

Now counsel for the Secretary will argue that the phrase "or hours" is not applicable to exempt employees. Yet, how is the "reasonable person" to decipher such a minute detail when given the fact that every other word or phrase within the announcement does apply to both exempt and non-exempt employees. An additional indication may be shown in a letter addressed to Pierce from the Secretary wherein he stated, "I agree that we need to reexamine existing obstacles to flexible leave policies", and, "These provisions show that Congress recognizes, as you said in your letter, that '[t]he isolated hour or two can be just as important as the unpaid week leave for personal/family needs.'" (see full text in Appendix F).

The regulations do provide a method for resolution to the conflict established by the recent enforcement of the

[15] During testimony at the district trial, the DOL's compliance officer stated that "day" was not defined in the law or the regulations, and that if she were to state that she was going shopping one day next week, she would not intend to spend eight hours in such pursuit, showing by example that a "day" conjures many interpretations in today's society for the "reasonable person".

"salary basis" test, wherein it includes a "window of correction" that states as follows:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.
> 29 C.F.R. §541.118 (a)(6) (emphasis added).

Here again, the interpretation may rest with the ordinary meaning of the "reasonable person" and be influenced by the interpretations that can be derived from the preceding and ensuing paragraphs. The one and only qualification that is placed on the use of the "window" is whether deductions were made when work was available.[16]

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[16] Pierce testified under oath at the district trial that on three occasions he offered to satisfy the perceived obligation in accordance with the "window of correction" just to have the offer rejected outright by counsel for the Secretary. The offers came as early as November 1988, and at a time when Pierce's financial situation would have allowed him to meet the obligation to reimburse employees for time taken off based on personal needs and discretion, and not due to a "lack of work." However, when the magistrate judge agreed and ruled that Pierce was entitled to the "window of correction", Pierce's financial condition was so dire that the reimbursement could not be immediately made, but had to wait until funds became available from the sale of the family's residence.

Numerous court decisions within the last five years have provided almost an equal number of interpretations.[17] Yet at the same time some courts have rightfully removed themselves from slipping into the "legislative process" regarding interpretation of ambiguous language, stating, "Therefore, we join in the observation: 'If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what the agency intended but did not adequately express.'" *Phelps Dodge Corporation v. Federal Mine Safety and Health Review Commission,* 681 F.2d 1189, 1193 (9th Cir. 1982), citing *Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Commission,* 528 F.2d 645, 649 (5th Cir. 1976). This Court agreed that deficient regulations should be construed against the agency: "The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 103 S. Ct. 2856, 2867, 77 L.Ed.2d 443 (1983); citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577 (1995). Yet, in the only non-public employer, partial day case that has been cited against Pierce, the court took precisely such action when discussing the "window of correction":

> "However, we have grave doubts that the Department of Labor intended the regulation to be read alternatively with respect to the reasons underlying the barred deduction. We believe that a better reading of the regulation

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17 In granting an exemption to public employers, from the very provisions the Department seeks to hold Pierce bound, the Secretary stated, "The courts in these cases have approached the construction of the regulations in different fashions, and have reached differing results." Federal Register Vol.56, No.173, p45824.

> would take these conditions conjunctively, requiring that the improper deductions have been made both for "reasons other than lack of work" and "inadvertently."

Martin v. Malcolm Pirnie, Inc., 758 F.Supp. 899, 906 (S.D.N.Y. 1991). It is not possible to meet both inadvertence and deduction for other than lack of work. The interpretive conjunctive, rather than the written disjunctive, eviscerates the "window of correction".

Lastly, the Department of Labor has fallen in violation of the precise "salary basis" test of which they have enforced against Pierce[18]. Numerous Circuits have held that the agency's enforcement against others (of regulations it itself is in violation of) is rendered invalid. *See, e.g., Gulf States Manufactures, Inc., v. N.L.R.B.* 579 F.2d 1298, 1038 (5th Cir. 1978) ("It is well settled that an Executive Agency of the Government is bound by its own regulations, and have the force and effect of law, and failure of an agency to follow its regulations renders its decision invalid."); *United States v. Newell,* 578 F.2d 827, 834 (9th Cir. 1978)("... federal courts will require federal agencies to abide by the agency's own regulations, even where the regulations are more generous than required by law. The purpose of this rule is to prevent

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[18] In a recent arbitration case involving a claim for overtime pay initiated by DOL Compliance Officers and Compliance Specialists, the arbitrator expressed the view that, under the DOL regulations, employees who are required to take annual or sick leave to be paid their full wages for weeks in which they worked less than forty hours are not paid on a salary basis and, therefore, are not exempt. *United States Department of Labor and American Federation of Government Employees,* 100 Lab. Arb. (BNA) 167, 174n.12 (1992)(Abrams, Arb.) Ironically, the arbitrator ultimately concluded that the DOL employees at issue were not the exempt administrators that the Department tried to claim them to be as their duties did not fit the applicable duty test for the administration exemption. *Id.* at 175.

unjust discrimination and denial of adequate notice of procedures by the agency in violation of due process."); *Frisby v. U.S. Dept. of Housing & Urban Development,* 755 F.2d 1052, 1055 (3rd Cir. 1985) ("Failure on the part of the agency to act in compliance with its own regulations is fatal to such action.").

Given the confusion surrounding the point in time when deductions are permissible, Pierce requests the Court to issue the Writ and to hold that, in the absence of defining words and regardless of the Secretary's intentions, the plain language of the "reasonable person" used within the regulations requires the employee to be "ready, willing, and able to work" and allows for deductions of hours when he or she is not.

III.

Whether the Portal to Portal Act of 1947, 29 U.S.C. §251 *et seq.*, enacted by the 80th Congress provides protection for the employers, who acted in "good faith", from liabilities concerning otherwise salaried exempt employees that have received "partial day deductions" and are, per the DOL's interpretation of the labor regulations, automatically converted to hourly non-exempt employees by sole virtue of the partial day deductions.

Due to a number of concerns for employers, rising labor litigation of the mid and latter 1940's, and fears very similar to those expressed by the Secretary with regard to public sector employers that prompted the exemption in 1992 (see the first question presented for review regarding this issue), Congress debated and enacted the Portal to Portal Act of 1947[19]. Among its notable provisions is:

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19 See Appendix D

SECTION 4 RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act Of 1938, as amended, The Walsh-Healey Act, or The Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in, on, or after the date of the enactment of this Act --

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Portal to Portal Act (29 U.S.C. §251)(emphasis added).

To develop an understanding of the Congressional intent regarding the activities covered by the terms "preliminary / postliminary / principal activities", one needs to look at the way the terms were addressed by the bill's sponsor during debate on the Senate floor. After some significant debate as to the meaning of the terms, a dialogue

between Senators Donnell and Hawkes provides the insight of what the intention was to include:

> Mr. Hawkes: Is it true that the bill states that portal-to-portal activities do not come under the term "work" unless the parties specifically understand and agree that they are to come under the term?
>
> Mr. Donnell: Either by contract or custom or practice.
>
> Mr. Hawkes: Yes; either by contract or custom or the habits of the community that are familiar to the people.
>
> Mr. Donnell: No, Mr. President; I would not say "the habits of the community"; but the custom in the particular place of business or particular establishment or other place where the employer is employed.
>
> Mr. Hawkes: That is exactly what I meant. Probably I misspoke myself. To give an illustration, am I not correct in understanding that the Senator is saying that the parties can agree to anything which they wish to agree to as being "work"?
>
> Mr. Donnell: Certainly.
>
> Mr. Hawkes: In other words, they can agree either verbally or in writing that everything an employee does from the time he gets out of bed in the morning and performs his ablutions until he gets home at night will be regarded as work, so long as they expressly provide so in the contract and know it must be paid for as work.
>
> Mr. Donnell: The Senator is precisely correct.

Congressional Record - March 18, 1947.

Clearly the time spent by Pierce's employees for recreational pursuits, when work was available, was not within the definition of "principal activities" nor covered by any contractual agreements. The flexibility was merely provided to the employees solely for their benefit and at their discretion, and therefore should not subject Pierce to a negative application. Consequently, no liability or punishment should be afforded the Secretary in his claim against Pierce. Additional comments by Senator Hawkes include:

> If I may, I should like to inject into the Senator's statement, which seems to me to be very clear, the assertion that unless he knows what his obligations are, no one can operate a business. In the absence of such knowledge I defy anyone on earth to tell me that he can conduct a business, maintain it, and keep it functioning for the benefit of the employees, the owners, and the general public. The very heart of the successful conduct of a business is knowledge of what one's obligations are, and success cannot follow if a multitude of imaginary items may be brought forward at a late hour, when the owner or manager of a business thinks he is solvent, only to find, if he is legally bound under newly suggested obligations, that he is insolvent and out of business. That is not the United States of America.

Congressional Record - March 18, 1947.

Although the amendment to the FLSA does not explicitly pertain to one category of employees over another, the position of the Secretary and the 6th Circuit has been that it applies to non-exempt employees and their employers. If

the Secretary's argument to the Court should prevail and all of Pierce's employees are recategorized as non-exempt employees eligible for overtime payments, then Section 10 of the Portal to Portal Act of 1947 should apply.

> SECTION 10 RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC. –
> (a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on the account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act Of 1938, as amended, The Walsh-Healey Act, or The Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith conformity with and in reliance on any written administrative regulation, ... such a defense, if established, shall be a bar to the action or proceeding, not withstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

Portal to Portal Act (29 U.S.C. §251 *et seq.*)(emphasis added). The DOL recognized the bar to enforcement where there has been a "good faith" attempt at reliance on the written regulation (see Final Rule *Federal Register*, Vol. 57, No. 161, page 37668).

The fact that Pierce exercised "good faith" is well documented in the case at the district court level. The initial

complaint lodged against Pierce by the Secretary charged that the violation was "a willful and purposeful" violation of the law, only to be withdrawn by counsel representing the Department immediately prior to the opening statements of the trial. The effective result of such withdrawal was an admission that the deductions must have been made in "good faith" if not "willful and purposeful." The magistrate judge supported this conclusion when he stated in his decision that:

> Here it is clear that the defendant's [Pierce's] deductions were never made because work was lacking, but only when the employees were voluntarily absent for personal reasons unrelated to whether work was available. Defendants have offered to reimburse all employees for the deductions made. Further, defendant has not only promised to comply with the Act in the future, but is currently in compliance. All other aspects of this case point to a situation where the employer intended to pay his employees on a "salary basis", intended to operate within the letter and spirit of the Act, and sought to treat and pay his employees in a manner that was professional, considerate and equitable.
> Page C8, attached hereto in Appendix C.

The removal of the "willful and purposeful" claim by the counsel for the Secretary prior to the opening statement at the district court is a clear indication that the Secretary was fully aware at the onset that such an "act or omission" was done in "good faith." It was an admission that the employees met the duties test, were guaranteed a fixed sum of pay without deduction for quality and quantity of work performed, never received deductions for the operating needs of the business or due to lack of work, and that compensation

was provided for jury duty / attendance as a witness / temporary military leave, and at all times when the employee was "ready, willing, and able to work".

Consequently, the question for the Court is whether the Portal to Portal Act of 1947 provides protection for Pierce from "...any liability or punishment ..." and barred the action against Pierce in the first place because deductions were made in "good faith" at times when work was available, but the employees were not "ready, willing, or able to work."

CONCLUSION

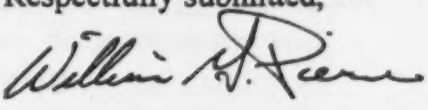
Pierce's employees enjoyed the benefits of salaried exempt employment status including all the requirements specifically stated within the provisions of the labor regulations, and in particular, a guaranteed income when they were "ready, willing, and able to work." In addition to all such benefits, they received additional compensation for the extra effort they expended, and had the flexibility to establish their own schedule for their well being and that of their family's. Unfortunately, the ambiguity within the "salary basis" test provided a vehicle for the DOL to develop an interpretation contrary to Pierce's pay practice and that of many public and private employers.

In an effort to rectify the situation and allow public employers the ability to escape the "potentially enormous and generally unexpected back wage liability", the DOL initiated an exemption that, while pertaining to solely public employers, left a similar liability on the backs of private employers, and thus denying them "equal protection of the law". While the protection for such cases occurring in "good faith" is in the same legislation enacted by Congress that includes the statute of limitations for such cases, the Department and the courts have chosen to reject the stated

intent of Congress and continues to hold the employer liable for "good faith" violations.

Pierce requests the Court to issue the Writ of Certiorari to avoid both the serious injustice to private employers and to prevent severe economic consequences to companies that have acted in good faith.

Respectfully submitted,



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APPENDICES

APPENDIX A: Decision by the United States Court of Appeals, Sixth Circuit, December 1994.

APPENDIX B: Final Judgment by the United States District Court, Southern District of Ohio, Western Division, February 1993.

APPENDIX C: Findings of Fact, Conclusions of Law, Decision and Order of the United States District Court, Southern District of Ohio, Western Division, March 1992.

APPENDIX D: Findings and Policy of the Portal to Portal Act of 1947 (29 U.S.C. §251).

APPENDIX E: Transcript of DOL prerecorded phone message.

APPENDIX F: Letter from Secretary of Labor Robert B. Reich to Pierce dated February 26, 1993.

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 93-3279/93-3446

LYNN MARTIN, Secretary of Labor
UNITED STATES DEPARTMENT OF LABOR
Plaintiff - Appellee
Cross - Appellant

vs.

PIERCE PROCESSING, INC., et al.,
Defendants - Appellant
Cross - Appellee

Decided December 20, 1994

BEFORE: CELEBREZZE, KEITH, and SUHRHEINRICH, Circuit Judges

PUR CURIAM: Defendant-Appellant, William G. Pierce ("Pierce"), appeals the district court's final judgment finding Pierce's employees were not exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA") and ordering payment of overtime compensation to 17 employees. For the reasons stated below, we AFFIRM.

I. Facts

Pierce was the founder, owner, and president of Pierce Processing, Inc. ("PPI"), an Ohio engineering consulting firm which advises manufacturing companies concerning the development of new manufacturing processes or packaging concepts. The company did over one million

dollars in business annually between 1986 and 1988, and Pierce controlled PPI's operations and pay policy.

PPI paid its engineers, design managers, and designers a set salary which could be reduced if the employees worked less than a full day. PPI deducted compensation based upon the number of hours an employee was absent from work. The company computed employees' hourly rates by dividing the agreed salary by 2080 (40 hours times 52 weeks), and deducted pay for hours not worked from this calculation. Additionally, the firm paid all overtime hours at a straight hourly rate, rather than a time and a half premium. Based on the above, in June 1988, compliance officer Sara Cazel ("Cazel"), from the Department of Labor's Wage and Hour Division, investigated PPI and concluded the firm had committed overtime violations.

On January 10, 1989, the Secretary of Labor ("Secretary") brought this action against PPI and Pierce alleging intentional violations of the overtime and record keeping provisions of FLSA and sought a permanent injunction, unpaid overtime compensation owed the defendants' employees, and liquidated damages pursuant to 29 U.S.C. §201 et seq. PPI and Pierce denied the Secretary's allegations and asserted the action was barred by FLSA's statue of limitations.

On October 23, 1991, pursuant to an agreement between the parties, the district court transferred the case to a United States Magistrate Judge, who conducted a trial on February 3, 1992. On March 26, 1992, the magistrate judge concluded the defendants had not violated the recordkeeping provisions of the Act. Additionally, the magistrate determined the employees were exempt from the overtime provisions, but only so long as defendants reimbursed their

employees for the deductions from their pay and promised to comply with the Act thereafter.

Five months later, the defendants had not met the requirements of the magistrate judge's decision. On November 30, 1992, the magistrate judge gave PPI and Pierce 30 days to reimburse the employees. A month later, the defendants requested an extension for reimbursement until February 1, 1993. On February 9, 1993, recognizing the defendants failed to reimburse their employees and had not promised subsequent compliance with the Act, the magistrate judge determined defendants' employees were not exempt, and ordered Pierce to pay $10,842 in back overtime wages plus interest. The magistrate judge did not grant the Secretary's request for a prospective injunction or liquidated damages. This timely appeal followed.

II. Discussion

On appeal, Pierce argues:

(1) PPI's employees are not entitled to overtime pay; and

(2) the applicability of the "window of correction" in 29 C.F.R. §541.118(a)(6) is dependent upon his financial status.

On cross-appeal, the Secretary argues the magistrate judge improperly failed to grant a permanent injunction prohibiting Pierce from engaging in future violations.

We address each of these issues separately below.[1]

---

[1] We note that Pierce, proceeding pro se, cannot represent PPI. A corporation must be represented by legal counsel and cannot proceed pro se. Doherty v. American Motors Corp., 728 F.2d 334, 340 (6th Cir.1984). It is insufficient that the person attempting the representation is an officer of the corporation. Ginger v. Cohn, 426 F.2d 1385, 1386

A. Pierce's Employees Are Hourly Workers Entitled to Premium Pay

FLSA provides that an employer must pay each employee "at a rate not less than one and one-half times the regular rate at which he is employed" for all hours worked in excess of 40 hours per week. See 29 U.S.C. §207(a)(1). Employers are exempt, however, from paying premium overtime rates to employees "employed in a bona fide executive, administrative, or professional capacity . . . " 29 U.S.C. §213(a)(1). An employer need not pay the premium to an employee who qualifies as an exempt bona fide professional paid "on a salary or fee basis." 29 C.F.R. §541.3(e). An exempt professional is paid on a salary basis if she regularly receives a predetermined amount which is not "subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. §541.118(a).

FLSA only permits deductions from a salaried employee's compensation for absences of a day or more. See 29 C.F.R. §541.118(a)(2) and (3). Employers are prohibited from deducting an exempt professional's pay for partial day absences, and such deductions are inconsistent with payment on a salary basis. "(A)n employee who can be docked for missing a fraction of a workday must be considered an hourly, rather than a salaried, employee." Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 615 (2d Cir. 1991), cert. denied, _ U.S. _, 112 S. Ct. 298 (1992).

Recognizing this law, on appeal, Pierce:

(1) attacks the validity of the regulation prohibiting partial day absences for salaried employees; and

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(6th Cir. 1970). Because Pierce is not a lawyer, has not retained counsel and is proceeding pro se, he cannot represent PPI on appeal. Accordingly, the only appellant before the court is Pierce.

(2) contends the magistrate judge improperly interpreted the regulation.

First, Pierce argues the prohibition of wage deductions for partial day absences promulgated by the Department of Labor in §541.118(a) impermissibly conflicts with congressional intent of FLSA. Pierce incorrectly argues subsequent legislation reveals congressional intent providing for compensation of hourly employees only when they perform work and flexible unpaid leave[2]. Subsequent legislation does not dismiss the regulatory exemption for salaried workers and Pierce's argument must fail.

Next, Pierce alleges the magistrate judge erroneously interpreted the meaning of the term "day" as used in 29 C.F.R. §541.118(a)(2). According to Pierce, because a "day" actually means less than a full, eight hour, working day, partial day absences constitute a "day" under the regulations. Thus, he properly docked employees' pay for missing a "day". We summarily reject Pierce's argument and find that for the purposes of 29 C.F.R. §541.118(a)(2) and (3), a working day constitutes the standard, eight-hour day.

Rejecting the validity of Pierce's arguments, we find Pierce's employees are hourly workers entitled to premium pay and did not fall under the salaried exemption. The engineers, design managers, and designers did not qualify for exempt salaried professional status, because their compensation was subject to reduction because of the variations in the quantity of hours worked. These deductions did not result from absences of a day or more, but rather were for partial days. Because Pierce's employees were docked pay for missing a fraction of a workday, they cannot

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[2] Pierce cites FLSA Admendments of 1947, 29 U.S.C. §251 *et seq.* and the Family and Medical Leave Act of 1993, 29 U.S.C. §2601 *et seq.*

be considered salaried employees exempt from overtime compensation, but rather hourly workers entitled to overtime pay at one and a half times premium. Here, PPI failed to pay each employee at a premium rate for overtime. This failure violated FLSA.

B. The Applicability of the "Window of Correction" in 29 C.F.R. §541.118(a)(6) is Dependent Upon Pierce's Financial Status

Pierce next argues the application of the "window of correction" exception should not turn upon his ability to reimburse docked employees. As noted above, the magistrate judge initially applied the "window of correction", allowing PPI to maintain the salaried, exempt from overtime status of certain employees. The magistrate judge conditioned the application of the "window of correction" upon Pierce's reimbursement of employees for past deductions and Pierce's promise of subsequent compliance. After Pierce's continued failure to reimburse the employees and to promise future compliance with the Act, the magistrate judge concluded PPI's employees were not exempt from the overtime provisions and ordered Pierce to pay overtime compensation for the entire period from January 9, 1987 to December 31, 1988.

Pierce claims his financial inability excuses his failure to reimburse the past deductions. Pierce proposes that the "window of correction" maintaining salaried, exempt from overtime status, should be removed only if an employer is financially able to repay deductions but refuses to do so. Pierce argues the magistrate judge erroneously removed the "window of correction" because he was financially unable to repay the deductions. We disagree.

> FLSA provides that:
> . . . where a deduction not permitted by these interpretations is inadvertent . . . the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. §541.118(a)(6). The window of correction essentially allows "employers to treat otherwise eligible employees as salaried regardless of the employer's one-time or unintentional failure to adhere to §541.118(a)'s requirements." Martian, 949 F.2d at 616. Here, pursuant to the window of correction, the magistrate judge did not initially find exemption status had been lost on March 26, 1992. The magistrate judge, however, pursuant to the regulation, conditioned the finding on PPI's reimbursement of employees for deductions and promise of future compliance. Almost one year later, after Pierce had satisfied neither condition, the magistrate judge considered the salaried, overtime exemption status lost and ordered Pierce to pay those employees overtime pay. Contrary to Pierce's claims, the regulation provides for no extension of exempt status due to inability to pay. Even had such a provision existed, Pierce provided no evidence supporting his ability to repay the deductions. We therefore find the magistrate judge correctly removed the "window of correction" and ordered PPI to pay overtime rates.

C. The magistrate Did Not Abuse His Discretion By Refusing to Grant a Permanent Injunction.

On cross-appeal, the Secretary argues the magistrate judge improperly failed to grant a permanent injunction prohibiting Pierce from engaging in future violations. We disagree.

Although courts may enjoin violations of the overtime provisions of FLSA, 29 U.S.C. §217, the imposition of an injunction under FLSA lies within the discretion of the trial judge. Martin v. Funtime, Inc., 963 F.2d 110, 113 (6th Cir. 1992); Wirtz v. Flame Coal Co., 321 F.2d 558, 560 (6th Cir. 1963). While we recognize the important purposes of FLSA compliance and PPI's failure to adhere to the magistrate judge's past orders, we cannot find the magistrate judge abused his discretion by not issuing a prospective injunction.

III. Conclusion

For the foregoing reasons, we find the magistrate judge properly determined Pierce's employees were not exempt from the overtime provisions of FLSA and ordered Pierce to pay overtime compensation. Additionally, the magistrate judge did not abuse his discretion denying the Secretary's request for injunctive relief. Therefore, we AFFIRM the final judgment of the Honorable Jack Sherman, Jr., United States Magistrate Judge for the Southern District of Ohio, Western Division.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-89-15

LYNN MARTIN, Secretary of Labor
UNITED STATES DEPARTMENT OF LABOR
Plaintiff

vs.

PIERCE PROCESSING, INC., et al.,
Defendants

[Filed February 9, 1993]

Judgment in a Civil Case

This action was brought by plaintiff, United States Department of Labor (plaintiff) against Pierce Processing, Inc. (PPI) and William Pierce (Pierce) under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. §201 et seq. (ACT). Plaintiff alleged that PPI failed to pay certain of its employees overtime compensation to which they were entitled, 29 U.S.C. §207 (a)(1), and failed to maintain certain records in violation of §§11(c) and 15(a)(5) of the Act. Defendants, PPI and Pierce, denied that they failed to pay any employees unpaid overtime compensation because the employees in question were exempt from the overtime provisions of the Act pursuant to 29 U.S.C. §213(a)(1). Defendants also denied that they failed to maintain records as required by the Act.

This case was tried to the Court on Monday, February 2, 1992. The Court issued Findings of Fact, Conclusions of Law, Decision and Order on March 26, 1992 (doc. 29). The Court found that the defendants had not violated the record keeping provisions of the Act. The Court further found that, subject to the conditions that (1) defendants reimburse their employees for the deductions made, and (2) defendants promise to comply with the Act in the future, the employees in question were exempt from the overtime payment provisions of the Act (doc. 29, p.9).

On September 4, 1992, the Court held a telephone conference to determine the status of Pierce's efforts to reimburse his employees as previously ordered by the Court. On September 16, 1992, Pierce was ordered to show cause, in writing and within ten (10) days of receipt of the show cause order, why the Court's March 26, 1992 Findings of Fact should not be rescinded and judgment awarded to plaintiff. Exh. 33. On November 30, 1992, this Court ordered Pierce to fully reimburse his employees within thirty (30) days of receipt of the order, and ordered both parties to jointly inform the Court of the status of this matter. On December 30, 1992, Pierce requested until February 1, 1993 to reimburse the employees as ordered. The Court finds that reimbursement has not been made.

Defendants, having failed to comply with this Court's order that (1) reimbursement be made to their employees, and (2) a promise to be made to comply with the Act in the future, this Court hereby finds as follows:

1. Defendants' employees were not exempt from the overtime provisions of the Act. See 29 U.S.C. §207(a)(1), 29 C.F.R. §541.3(e), 541.118(a), (a)(2) and (a)(6).

2. Defendants are hereby ORDERED to pay overtime compensation due under the Act for the period from

January 9, 1987 through December 31, 1988, plus interest, to the following employees:

Paul Bruggeman	$105.00
Robert Cooks, Jr.	87.45
Gregory DelVecchio	989.36
Harry Driskill, Jr.	17.25
Francis Fulcher	105.00
Leslie Glickman	4299.75
Jack Hogue	0
Robert Holt	0
Howard Kennedy	474.50
Mary Beth Manis	154.63
Herbert McBride	61.50
Theodore McCullough	408.25
Christopher Olbur	1047.37
Gian Parihar	151.44
Robert Pocotte	306.00
Joseph Pravitz	0
Jay Scales	74.95
John Shryock, Jr.	304.70
David Toth	1554.30
Kenneth Witsken	700.63

3. Costs of this action are assessed to defendants.

IT IS SO ORDERED

/s/Jack Sherman, Jr.
Jack Sherman, Jr.
United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-89-15

LYNN MARTIN, Secretary of Labor
UNITED STATES DEPARTMENT OF LABOR
Plaintiff

vs.

PIERCE PROCESSING, INC., et al.,
Defendants

[Filed March 25, 1992]
Findings of Fact, Conclusions of Law, Decision and Order

This matter is before the Court upon consent of the parties for final disposition. Doc. 28. Trial to the Court occurred on Monday, February 2, 1992.

This is an action brought by plaintiff, Lynn Martin, Secretary of Labor, United States Department of Labor (Plaintiff) against Pierce Processing, Inc. (PPI) and William G. Pierce (Pierce) under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. §201 et seq. (Act). Plaintiff alleges that PPI failed to pay certain of its employees overtime compensation to which they were entitled, 29 U.S.C. §207(a)(1), and failed to maintain certain records (the home addresses of PPI's former employees) in violation of §§11(c) and 15(a)(5) of the Act. Defendants, PPI and Pierce,

deny that they have failed to pay any employees unpaid overtime compensation because the employees in question are exempt from the overtime provisions of the Act pursuant to §13(a)(1) of the Act, 29 U.S.C. §213(a)(1). Defendants also deny that they have failed to maintain records as required by the Act.

FINDINGS OF FACT

1. PPI is an Ohio corporation with offices in Cincinnati, Ohio and Louisville, Kentucky, and is engaged as an engineering consulting firm.

2. Defendant Pierce is the President of PPI and is primarily responsible for its day-to-day operations.

3. PPI consults with clients regarding the development and engineering of equipment for new products; the modification of existing products; and the packaging of products.

4. Defendants' annual dollar volume of business was in excess of $1,000,000 in 1986, 1987, and 1988 respectively.

5. Defendant, Pierce Processing, Inc., employs engineers, design managers, and designers.

6. Between May, 1986 and May, 1988, PPI employed the following employees[1] as engineers, design managers, or designers for the various periods of time at the annual salary within the range set forth opposite the employee's name.

Employee		Salary Range
a.	Paul Bruggeman	$52,000
b.	Robert Cooks, Jr.	25,000-27,500
c.	Gregory DelVecchio	31,200-43,400
d.	Harry Driskill, Jr.	43,680-47,840

[1] These are only employees Plaintiff claims were unlawfully not paid overtime pay in accordance with the Act. See Joint Stipulation 2 and 3. Doc. 21.

e.	Francis Fulcher	55,120
f.	Leslie Glickman	48,360-54,080
g.	Jack Hogue	43,680-47,650
h.	Robert Holt	46,280
i.	Howard Kennedy	55,120
j.	Mary Beth Manis	30,160
k.	Herbert McBride	42,640
l.	Theodore McCullough	47,840-50,750
m.	Christopher Olbur	47,840-50,960
n.	Gian Parihar	33,280-42,120
o.	Robert Pocotte	41,600-47,840
p.	Joseph Pravitz	49,400-51,480
q.	Jay Scales	22,048-23,090
r.	John Shryock, Jr.	45,160-48,465
s.	David Toth	45,760
t.	Kenneth Witsken	50,440-56,000

7. From May, 1986 to January, 1989, PPI's policy was to pay its engineers and designers on a salary basis, but to reduce their compensation on an hourly basis when employees voluntarily elected to take time off for personal reasons.

8. From May, 1986 to January, 1989, defendant's policy was to pay its engineers and designers, in addition to their salaries, a straight hourly rate for hours worked in excess of forty (40) in a work week. The hourly rate was established by dividing the employee's annual salary by 2,080 hours.

9. From May, 1986 to January, 1989, PPI's engineers' and designers' salaries were not subject to reduction because of variations in the quality or quantity of work they performed. When there was no work available, those employees were paid their fixed salaries and were instructed, for management purposes, to record the time during which no work was available as "office hours" and were paid for same.

10. Said employees were also paid when absent for holidays, vacations, and were eligible to be paid for absence due to jury duty or attendance in court as a witness. Additionally, they were eligible for sickness and disability benefits under a sickness and disability policy established by PPI.

11. During the investigation by the Wage and Hour Division, Pierce, on behalf of PPI, offered to reimburse the employees with those amounts that had been deducted from their pay when they took off for personal reasons.

12. Based upon his experience while working for other employers in the engineering business, and upon his general understanding that engineers, as professionals, are not paid overtime compensation, Pierce, in good faith believed that the pay practice that he established complied with the requirements of the Act.

13. PPI's pay practices were intended to provide additional compensation to the employees who, because of client demands or, at times, deadlines for completing a project, were required to work more than forty (40) hours during a work week. further, the pay practices were established to provide the employees flexibility to establish their own hours in order to pursue family or recreational interests if, and when, they elected to do so.

14. As a result of being informed by the Wage and Hour Division that its pay practices violated the Act, effective January 1, 1989, PPI modified its pay practices in conformance with the requirements of the Act.

15. The parties agree that the employees in question meet all of the criteria for exemption from the overtime provisions of the Act. see 29 U.S.C. §213(a)(1), 29 C.F.R. §541.3, except for the requirement set forth in 29 C.F.R. §541.3(e) that they be paid on a "salary basis". Defendants claim their employees were paid on a "salary basis"; plaintiff disagrees. See Joint Stipulation 6. Doc. 21.

16. PPI maintained adequate and accurate records of its employees and of the wages, hours, and other conditions and practices of employment of defendants, including the addresses of its present and former employees.

17. Pierce cooperated with plaintiff's compliance officer and produced all records requested with one exception. Pierce declined to produce the home addresses of PPI's former employees for fear that if those individuals were contacted, it would quickly become known in the industry that PPI was being investigated by plaintiff, which could have a negative impact on his business.

18. Plaintiff never issued an administrative supoena requiring PPI to produce the addresses of former employees.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to §16 and §17 of the fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201 et seq.

2. Defendants constituted an "enterprise engaged in commerce" subject to the provisions of the Act. 29 U.S.C. §203(r)(1), §§203 (s)(1)(19)(i) and (ii).

3. Defendants are employers within the meaning of the Act. 29 U.S.C. §203(d).

4. An employee is considered paid on a "salary basis" if, under his or her employment agreement, he or she regularly receives each pay period a predetermined amount constituting all or part of his or her compensation which is not subject to reduction because of variations in the quality or quantity of the work he or she performs. Subject to certain exceptions,[2] the employee must receive his or her full salary for any pay period in which he or she performs any work without regard to the number of days or hours worked. 29 C.F.R. §541.118(a).

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[2] See § 6, Conclusions of Law.

5. An employee will not be considered to be on a "salary basis" if deductions from his or her predetermined compensation are made from absences occasioned by the employer or the operating requirements of the business. If the employee is ready, willing, and able to work, deductions may not be made for time when work is unavailable. 29 C.F.R. §541.118(a)(1).

6. Deductions are permitted when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. 29 C.F.R. §541.118(a)(2).

7. Where deductions are made when there is no work available, it indicates there was no intention to pay the employee on a "salary basis". Conversely, when deductions are not made when there is no work available, it indicates there was an intention to pay the employee on a salary basis. See 29 C.F.R. §541.118(a)(6).

8. Where a deduction not permitted is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future. 29 C.F.R. §541.118(a)(6)

9. Defendants' failure to produce the home addresses of former employees did not constitute a violation of the record keeping provisions of the Act, including 29 U.S.C. §211(a) and (c), or 29 C.F.R. §516.7(b), because plaintiff failed to issue an administrative subpoena or in anyway give defendants the opportunity to question the reasonableness of plaintiff's demand or to obtain protection therefrom, see Donovan v. Long Steer, Inc., 464 U.S. 408, 415 (1984).

DECISION

The Act requires employers to pay their employees one and one-half their normal hourly rate for hours worked over 40 in a work week. 29 U.S.C. §207(a)(1). PPI did not

comply with this requirement. Employers are exempt from this time and a half overtime requirement with respect to any employee employed in a bona fide executive, administrative, or professional capacity. 29 U.S.C. §213(a)(1). The parties agree that the employees in question, as professionals, qualify in all respects for the exemption from the overtime provision of the Act, except for the requirement that they be paid on a "salary basis". See 29 C.F.R. §541.3(e). Plaintiff contends the "salary basis" requirement is not met by defendants, because defendants reduced compensation on an hourly basis when employees voluntarily took time off for less than a day for personal reasons. Plaintiff contends this practice violates 29 C.F.R. §541.118(a)(2) which only permits deductions on a daily basis.[3] It was defendants' practice to take deductions from an employee's salary when the employee was absent for personal reasons for less than a day. Plaintiff contends defendants' practice of deducting wages on an hourly basis violates the Act and denies defendants an exemption from the overtime payment requirements of 29 U.S.C. §207(a)(1). The Court disagrees.

Defendants claim that because the word, "day", is not defined by the statute it is debatable whether or not defendants' salary deduction policies are in violation of 29 C.F.R. §541.118(a)(2). For purposes of this decision, the Court finds it unnecessary to decide this debate and assumes, arguendo, that defendants' policy of deducting wages based upon voluntary hourly absences violates 29 C.F.R. §541.118(a)(2). 29 C.F.R. §541.118 (a)(6) provides in pertinent part:

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[3] 29 C.F.R. §541.118(a)(2) reads in pertinent part as follows:

Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. (emphasis added)

> Where a deduction not permitted by these interpretations is inadvertent or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

Here, it is clear that defendants' deductions were never made because work was lacking, but only when employees were voluntarily absent for personal reasons unrelated to whether work was available. Defendants have offered to reimburse all employees for deductions made. Further, defendant has not only promised to comply with the Act in the future, but is currently in compliance. All other aspects of this case point to a situation where the employer intended to pay his employees on a "salary basis", intended to operate within the letter and spirit of the Act, and sought to treat and pay his employees in a manner that was professional, considerate and equitable.

The Court finds that defendants did not violate the record keeping provisions of the Act. See Conclusions of Law 9. The Court further finds that, subject to the conditions that (1) defendants reimburse their employees for the deductions made, and (2) defendants promise to comply with the Act in the future, the employees in question are, and were, exempt from the overtime payment provision of the Act.

ORDER

Defendants are hereby ORDERED to:

1. Reimburse their employees in conformance with this decision for salary deductions made; and
2. Promise to comply with the Act in the future.

Upon completion of one and two above, and written proof of same, the Court will enter a finding on behalf of Defendants.

IT IS SO ORDERED.

/s/ Jack Sherman, Jr.
Jack Sherman, Jr.
United States Magistrate Judge

Appendix D

Portal To Portal Act of 1947
PART 1: FINDINGS AND POLICY

SECTION 1. (a.) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, *(1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in;* (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees would be created; *(7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged;* (8) the Public

Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services hereto fore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increase cost of war contracts; and *(10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.*

The Congress farther finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, farther finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid , protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to the liability for liquidated damages) arise with respect to the Walsh-Healy Act and the Bacon Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; **and** ***(3) to define and limit the jurisdiction of the courts.***

Portal to Portal Act (29 U.S.C. §251) (emphasis added)

Appendix E

The following transcript is a verbatim transcription of an announcement which was telephonically recorded after dialing (513) 684-2942 which is the number published in the Greater Cincinnati telephone directory assigned to the Wage and Hour Division of the United States Department of Labor, 525 Vine Street, Suite 880, Cincinnati, Ohio:

"Hello, you've reached the U.S. Department of Labor, Wage and Hour Division. This office answers calls live on Monday, Wednesday, and Friday from 8:30 a.m. to 4:00 p.m. When another caller is on the line with us during those times you may also get this recorded message. We regret that we cannot return calls left on Tuesdays and Thursdays.

"The Wage and Hour Division enforces the Fair Labor Standards Act, the Family and Medical Leave Act of 1993, the Employee Polygraph Protection Act as well as government construction and service contracts acts.

"The Fair Labor Standards Act consists of minimum wage, overtime, record keeping, and child labor requirements.

"Currently the federal minimum wage is $4.25 per hour. The Act does not require any payment for vacations, sick days, holidays or any other days or hours not worked on the job. The Act does not require breaks of any kind.

"This office, again, answers calls live on Monday, Wednesday and Friday from 8:30 a.m. to 4:00 p.m. If another caller is on the line during those times you may get this recorded message. You may leave us a message on Monday, Wednesday, and Friday. Thank you.

Conclusion of Message

Appendix F

U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.
FEB 26 1993

Mr. William G. Pierce
Pierce Processing, Inc.
101 Commerce Boulevard
Loveland, Ohio 45140

Dear Mr. Pierce:

Thank you for your views on the Family Medical Leave Act. I believe that the Act, one of the first laws signed by President Clinton, will help balance the family and medical needs of American workers with the demands of the American workplace and enhance job security and worker productivity.

I agree that we need to reexamine existing obstacles to flexible leave policies. I believe the Family and Medical Leave Act is a step in the right direction. The Act allows for leave to be taken on an intermittent or reduced leave basis for the birth or adoption of a child, if the arrangement is agreed to by the employer. Additionally, the Family and Medical Leave Act provides that leave for serious health conditions -- either of a family member or the employee - - may be taken intermittently or on a reduced schedule if medically necessary, with or without the approval of the employer. *These provisions show that Congress recognizes, as you said in your letter, that "[t]he isolated hour or two can be just as useful and important as the unpaid week leave for personal / family needs."* With respect to the "pay docking"

issue, the Act provides: "[w]here an employee is otherwise exempt under the regulations issued by the Secretary . . . the compliance of an employer with this title by providing unpaid leave shall not affect the exempt status of the employees under such section." Section 102(c)

The Family medical Leave Act represents the first step - - the first of a great many steps - - in the Clinton Administration's mission to prepare the American workplace, and all of America's workers, to meet the challenge of the global economy. Again, thank you for your views.

Sincerely
/s/ Robert B. Reich
Robert B. Reich

(2)

No. 94-1823

FILED
JUL 10 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM G. PIERCE, PETITIONER

v.

ROBERT B. REICH,
SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's employees were properly held to be non-"professionals" and hence subject to the overtime-compensation requirements of Section 7(a)(1) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a)(1).

2. Whether regulations of the Department of Labor that employ different tests for determining whether an employee is a "professional" exempted from the FLSA's overtime-compensation requirements, depending on whether the employer is a public or private entity, comport with the equal protection component of the Due Process Clause of the Fifth Amendment.

3. Whether the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, provided a defense to petitioner against liability under the FLSA for not paying overtime compensation.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1823

WILLIAM G. PIERCE, PETITIONER

v.

ROBERT B. REICH,
SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is unpublished, but the decision is noted at 45 F.3d 431 (Table). The opinions of the district court (Pet. App. B1-B3, C1-C9) are unreported.

JURISDICTION

The judgment of the court of appeals was filed on December 20, 1994. A petition for rehearing was

denied on February 7, 1995.[1] The petition for a writ of certiorari was filed on May 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(a)(1) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 207(a)(1), requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate at which he is employed" for all hours worked in excess of 40 hours a week. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption from the requirement of overtime pay for "any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])."

Regulations promulgated by the Secretary provide that, in order to be a "bona fide * * * professional," an employee must both be paid on a "salary basis," 29 C.F.R. 541.3(e), and have primarily professional duties, 29 C.F.R. 541.3(a)-(d) (defining "professional" employees). See also 29 C.F.R. 541.1 (defining "executive" employees), 541.2 (defining "administrative" employees). Subject to several exclusions, an employee is not paid on a "salary basis," and thus is not a "bona fide * * * professional," if he is paid hourly or piecework wages rather than a salary. 29 C.F.R.

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[1] Although petitioner filed a document denominated "motion for rehearing en banc," the local rules of the Sixth Circuit provide that a suggestion of rehearing en banc will also be treated as a petition for panel rehearing. See Local R. 14(a). Accordingly, the period for filing a petition for a writ of certiorari in this Court did not begin to run until the court of appeals denied petitioner's motion. See Sup. Ct. R. 13.1, 13.4.

541.3(e) (bona fide professional employee must be "compensated for services on a salary * * * basis" at no less than a specified weekly rate), 541.2(e)(1) (administrative employee), 541.1(f) (executive employee).[2]

An employee is, however, paid on a "salary basis" if he regularly receives a predetermined amount of compensation that "is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a). As a general rule, a "salary basis" employee must also receive "his full salary for any week in which he performs any work without regard to the number of days or hours worked." *Ibid.*[3] An employer may, however, make deductions from a salaried employee's predetermined compensation to reflect absences of "a day or more" for personal reasons other than sickness or accident (29 C.F.R. 541.118(a)(2)) and to reflect absences for "a day or more" due to sickness or disability if "made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability" (29 C.F.R. 541.118(a)(3)). But under no circumstances is an employee from whom pay is deducted to reflect partial-day absences paid on a "salary basis."[4]

The regulations further provide, in a subsection commonly referred to as the "window of correction," that an employer who has improperly deducted pay

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[2] Professional and administrative employees may also be paid on a fee basis. See 29 C.F.R. 541.2(e)(1), 541.3(e).

[3] An employee need not be paid for any workweek in which he performs no work. 29 C.F.R. 541.118(a).

[4] As explained, p. 10, *infra*, special provisions apply in the case of public employers. 29 C.F.R. 541.5d.

from an employee to reflect partial-day absences may be given an opportunity to repay the deducted amount in order to restore retroactively the employee's professional status. See 29 C.F.R. 541.118(a)(6) (effect of an impermissible deduction for an absence of less than a day "will depend upon the facts in the particular case"). The regulation states in pertinent part (*ibid.*):

> Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

2. Petitioner is the founder, owner and president of Pierce Processing, Inc. (PPI), an engineering consulting firm. Pet. App. A1, C2. PPI employed engineers, design managers and designers and paid them a set amount that, under company policy, was reduced when, for personal reasons, the employees worked less than a day. *Id.* at A2, C3. PPI calculated an hourly rate for each employee by dividing the employee's compensation by 2080 hours (40 hours per week times 52 weeks), and PPI deducted pay for hours not worked based on this calculation. *Ibid.* PPI also paid employees overtime based on this straight hourly rate; it did not pay employees the FLSA-mandated overtime premium of one and one-half times their regular rate of pay. *Id.* at A2.

3. The Secretary of Labor brought this action against petitioner and PPI alleging that PPI had violated the FLSA by failing to pay employees at the overtime rate required by the Act. Pet. App. A2. Petitioner and PPI denied that overtime compensation had been due, on the ground that the employees in question were "professionals" within the meaning of Section 13(a)(1) of the Act. Pet. App. C1-C2. The parties agreed that the employees in question carried out "professional" duties as defined by the Secretary. They disagreed, however, as to whether, as petitioner and PPI claimed, the employees had been paid on a "salary basis" within the meaning of the regulations, or whether, as the Secretary alleged, deductions had been made to reflect partial-day absences. *Id.* at C4, C7.

Following a trial, the district court found that, prior to January 1, 1989 — at which point petitioner and PPI agreed to comply prospectively with the FLSA — "[i]t was [petitioner's and PPI's] practice to take deductions from an employee's salary when the employee was absent for personal reasons for less than a day." Pet. App. C7. The court initially held that it was unnecessary to decide whether, as a result of those deductions, the pertinent employees failed the "salary basis" test, because, in the court's view, petitioner and PPI were entitled to eliminate their liability retroactively by taking advantage of the "window of correction" provided by 29 C.F.R. 541.118(a)(6). That recourse was available, the court held, based on a combination of factors: deductions had not been made when work was lacking, but only when employees voluntarily had been absent for personal reasons; petitioner and PPI had promised to reimburse employees for the deductions PPI had made; PPI was

presently in compliance with the FLSA; and petitioner and PPI had promised to remain in compliance. Pet. App. C7-C8. The court accordingly ruled that, provided that petitioner and PPI repaid the improper deductions, it would enter an order to the effect that petitioner and PPI were exempt from the Act under the "window of correction." *Id.* at C8. That decision was issued on March 25, 1992. Five months later, the district court was notified that petitioner and PPI had not complied with its order requiring them to compensate employees for the improper deductions. The district court thereupon, in September 1992, issued an order requiring petitioner to show cause why the court's earlier order should not be rescinded and judgment entered in favor of the Secretary. *Id.* at A3, B2. On November 30, 1992, the district court ordered PPI and petitioner to reimburse the employees within 30 days. On February 9, 1993, with petitioner and PPI having still failed to repay the deducted income, the court entered judgment in favor of the Secretary. It held that "[d]efendants' employees were not exempt from the overtime provisions of the Act[,] [s]ee 29 U.S.C. §207(a)(1), 29 C.F.R. §541.3(e), 541.118(a), (a)(2) and (a)(6)," and ordered petitioner and PPI to pay $10,842 in back overtime wages plus interest. *Id.* at B2-B3.

4. The court of appeals affirmed. Pet. App. A1-A8.[5] It held that because petitioner's employees were

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[5] Both petitioner and PPI appealed, but the court of appeals dismissed PPI's appeal because PPI was not represented by counsel. See Pet. App. A3 n.1. The Secretary also filed a cross-appeal challenging the district court's refusal to grant a permanent injunction prohibiting petitioner and PPI from engaging in future violations of the FLSA. The court of appeals

docked pay for missing a fraction of a day, they could not be considered salaried employees, but rather were hourly workers entitled to overtime pay at the one-and-one-half-time premium mandated by the FLSA. *Id.* at A5-A6. In so ruling, the court first rejected petitioner's argument that the Secretary's regulation defining "salary basis" was inconsistent with what petitioner claimed was Congress's intent, as revealed in "subsequent legislation," to require compensation of employees "only when they perform work and flexible unpaid leave." *Id.* at A5. The court held that the enactments identified by petitioner do "not dismiss [*sic*] the regulatory exemption for salaried workers and [petitioner's] argument must fail." *Ibid.*[6] It also rejected petitioner's claim that the term "day" as used in 29 C.F.R. 541.118(a)(2) in fact includes partial days and that he was therefore entitled to deduct employees' wages for partial-day absences, because such absences were not "less than a * * * day." Pet. App. A5. The court held that the term "day" refers to "the standard, eight-hour day." *Ibid.*

The court of appeals also rejected petitioner's claim that the district court improperly denied him the opportunity to take advantage of the "window of correction." It held that the district court had acted properly and consistent with the Secretary's regula-

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held that the district court did not abuse its discretion in refusing to enter such an injunction. *Id.* at A7-A8.

[6] We assume that in the quoted passage the court meant "discuss," rather than "dismiss." The legislation upon which petitioner relied was the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, and the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.* See Pet. App. A5 n.2. Petitioner does not rely on the FMLA in his petition.

tion when it conditioned its finding of exempt status on petitioner's reimbursement of the deductions he had improperly taken, and on petitioner's promise to comply with the FLSA in the future. Pet. App. A6-A7. The court also rejected petitioner's claim that his alleged "financial inability excuse[d] his failure to reimburse the past deductions," noting that the regulation establishing a "window of correction" does not provide for an extension of exempt status due to inability to pay and that, in any event, petitioner "provided no evidence [regarding] his ability to repay the deductions." *Ibid.* The court of appeals thus held that the district court correctly "removed the window of correction" and ordered PPI and petitioner to pay the overtime compensation due. *Id.* at A7.

ARGUMENT

The decision below is correct, and it conflicts with no decision of this Court or of any court of appeals. Moreover, the judgment that has been entered in this case against PPI, petitioner's wholly owned corporation, is now res judicata. See n.5, *supra*. Review is therefore not warranted.

1. Petitioner argues (Pet. 8-17) that he was denied the equal protection of the laws because the Secretary's regulations presently define "salary basis" more restrictively in the context of private employers than in that of public employers. That claim was neither raised nor ruled upon below, and has therefore been waived. See *Sisson* v. *Ruby*, 497 U.S. 358, 359 n.1 (1990).[7] Moreover, petitioner's conduct

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[7] In a paragraph in the second of his two briefs to the court of appeals, petitioner argued that the more lenient definition of "salary basis" used in the public-employee context made

occurred prior to the Secretary's adoption of a different "salary basis" test governing public employers. As we explain below, the Secretary has promulgated a regulation, 29 C.F.R. 541.5d, that generally permits public employers to make deductions based on partial-day absences from the salaries of professional employees, without losing their exempt status. That regulation, however, was not adopted until August 1992, see 57 Fed. Reg. 37,666, 37,677 (1992), more than three years after the violations at issue in this case, and it does not apply retroactively. See *id.* at 37,678; *Kinney* v. *District of Columbia*, 994 F.2d 6, 10 (D.C. Cir. 1993). Petitioner thus has no standing to challenge in this lawsuit the distinction presently drawn by the Secretary between employees of public and private employers.[8]

"common sense," and argued that the same standard should apply to employees of private employers. See C.A. Br. 9-10. Petitioner, however, nowhere asserted that the differing standards utilized by the Secretary constituted a violation of the equal protection component of the Due Process Clause of the Fifth Amendment.

[8] A precursor of 29 C.F.R. 541.5d was adopted on an interim basis in September 1991, but adoption of that interim regulation also postdated the violations in this case. See 56 Fed. Reg. 45,824 (1991). Before that interim regulation was adopted, the Secretary had in 1987 announced that the Department of Labor would not enforce the "no partial-day deduction" rule against state and local governments in discrete circumstances. The Secretary's policy, however, did not alter the substantive standards of the "salary basis" test for public employers as set forth in the regulations, and the Department specifically advised public employers that "[t]his nonenforcement policy is not intended to affect any employee's rights under section 16(b) of [the] FLSA." See Letter Ruling, Department of Labor, Wage & Hour Division (Jan. 9, 1987), *reprinted at* 57 Fed. Reg. 37,668

In any event, the Secretary's differing definitions of "salary basis," depending on whether the employer is a public or private concern, comport with equal protection principles. A classification that treats some groups differently from others, but is not based on suspect classifications and does not affect fundamental rights, is valid if it has a rational basis. *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961); see also *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 306 n.32 (1985). The Secretary's regulation, 29 C.F.R. 541.5d, which amended the generally applicable "salary basis" test to provide greater latitude for public employers in making deductions from the pay of otherwise FLSA-exempted employees, has a rational basis.

The regulation provides, in pertinent part, that a public employee who otherwise qualifies as an executive, professional, or administrative employee will not lose that status if the employee

> is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one workday.

(1992); see also *Kinney*, 994 F.2d at 9 (despite nonenforcement policy, holding public employer liable based on its violations of pre-1992 regulatory scheme).

29 C.F.R. 541.5d. As the Secretary has explained, the Department of Labor modified the "no partial-day deductions" rule in the public-employee context based on its evaluation of the unique nature of public employment. That evaluation was occasioned by this Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which held that the FLSA could constitutionally be applied to state and local government employees performing traditional governmental functions.[9] The Secretary noted that the general "salary basis" regulations—first promulgated in 1940—had been based on evidence that professional, executive, and administrative employees in the private sector were nearly always paid on a salary basis. 57 Fed. Reg. 37,666-37,668 (1992). By contrast, the Secretary noted, public employers are normally subject to "principles of public accountability" that prohibit paying employees for time not worked. See *id.* at 37,667.

Applying to public employers the traditional "salary basis" rule regarding the deduction of pay for partial-day absences, the Secretary recognized, would prevent state and local governments from availing themselves of the exemption to the requirement of overtime pay for professional, administrative, and executive employees. 57 Fed. Reg. 37,667 (1992). That result, however, would be inconsistent with Congress's intent in extending the FLSA to state and public employers,

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[9] The FLSA had been amended in 1966 and 1974 to cover governmental employers. However, it was not until the 1985 decision in *Garcia*, in which this Court overruled *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), that the FLSA's provisions could constitutionally extend to state and local public employees engaged in traditional governmental functions.

because it was clear that Congress had intended that such employees be exempt in the public-sector context. *Id.* at 37,672. Indeed, the Secretary noted that, since the decision in *Garcia*, public employers had been exposed to "potentially enormous and generally unexpected back wage liabilities" for wages owed to employees who would have been considered exempt "professionals" were it not for their employers' adherence to a "public accountability" pay system that required partial-day deductions. *Id.* at 37,669, 37,670. Thus, the Secretary concluded, "the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees." *Id.* at 37,672.[10]

The distinction presently drawn between the "salary basis" test applicable to private employers and that applicable to public employers therefore plainly has a rational basis. In the judgment of the Secretary, the "public accountability" pay systems under which public employees are paid make the "no partial-day deductions" rule an ill-suited and unrealistic measure of whether particular employees are exempt professionals. By contrast, the Secretary reasoned, the traditional "salary basis" test remains a useful

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[10] In light of the Secretary's detailed explanation of his reasons for adopting Section 541.5d, petitioner's suggestion (Pet. 11-12) that the Secretary has not supplied an adequate explanation for his change of policy is without merit. See 57 Fed. Reg. 37,667-37,673 (1992). Moreover, the regulation is clearly a valid exercise of the broad rulemaking authority granted to the Secretary to define and delimit the Section 13(a)(1) exemptions. Compare *Batterton* v. *Francis*, 432 U.S. 416, 424-426 (1977).

criterion in the private sector. See *Mueller* v. *Reich*, Nos. 94-3262 & 94-3263 (7th Cir. May 15, 1995), slip op. 6-7 (to be reported at 54 F.3d 438) (holding, based on the need for public employees to be subject to principles of "public accountability," that 29 C.F.R. 541.5d is rationally related to the objectives of the FLSA).

2. Petitioner next argues (Pet. 17) that the Secretary has misinterpreted his own regulations in determining that a private-sector employee who has been subject to deductions reflecting partial-day absences is not an exempted "professional." Petitioner contends that those regulations should be interpreted to bar employers only from making deductions for hours not worked due to the unavailability of work, and that employees should not lose their exempt status where pay has been deducted for hours that the employee has not worked due to personal unavailability. Petitioner's claim is defeated by 29 C.F.R. 541.118(a)(2), which makes an exception from the general rule that salaried employees are paid "without regard to the number of days or hours worked," but only "if an employee is absent for *a day or longer* to handle personal affairs." *Ibid.* (emphasis added). No such exception applies for deductions reflecting partial-day absences. See *Michigan Ass'n of Governmental Employees* v. *Michigan Dep't of Corrections*, 992 F.2d 82, 84 (6th Cir. 1993); *Klein* v. *Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 283 (7th Cir. 1993); *Donovan* v. *Carls Drug Co.*, 703 F.2d 650, 652 (2d Cir. 1983).

Also unavailing is petitioner's claim (Pet. 17-24) that there is "confusion" about what constitutes a day within the meaning of the regulation. The Secretary has interpreted that term, consistent with its ordinary usage, to mean the employee's customary work day,

see Gov't C.A. Br. 24-26, and the court of appeals likewise recognized that term to connote "the standard eight-hour day," Pet. App. A5. The decisions on which petitioner relies (Pet. 18 nn.10, 12) do not discuss the proper interpretation of the term "day." There is some tension in those decisions on a separate question: whether an employer loses the Section 13(a)(1) exemption when employees are merely "subject to" a policy of partial-day deduction, or whether the employer must have made an actual deduction from employees' compensation to reflect a partial-day absence. Compare *Atlanta Professional Firefighters Union* v. *City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991) (actual deductions required in order for employer to lose exemption) with *Abshire* v. *County of Kern*, 908 F.2d 483 (9th Cir. 1990) (exemption lost where employees are "subject to" policy under which such deductions would be mandated), cert. denied, 498 U.S. 1068 (1991). That issue is not presented in this case, however, because it is clear that petitioner and PPI actually deducted compensation from employees based on partial-day absences. See Pet. App. C7. Moreover, petitioner has not argued that relief in this case should have been awarded only to those employees who experienced actual deductions and only to the extent of those deductions.

3. Petitioner next argues (Pet. 28-30) that the decision below is inconsistent in two respects with the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.* Petitioner claims first (Pet. 30-31) that his practice of making deductions for partial-day absences was justified under Section 4(a)(2) of the Act, 29 U.S.C. 254(a)(2), which relieves employers of the duty to pay minimum wage and overtime compensation for

activities either preliminary or subsequent to the principal activities that the employee is employed to perform. The Portal-to-Portal Act, however, merely defines certain activities for which the employer is not required to provide compensation at all; it does not address the question whether an employee is "salaried" or otherwise falls within the Section 13(a)(1) exemption for professional, executive, or administrative employees. Moreover, the Secretary's "salary basis" regulation does not require that employees be compensated for absences of less than a day. It merely provides that if deductions are made to reflect such absences, the affected employees may not be considered exempted professional, administrative, or executive employees.

Petitioner also claims (Pet. 31) that he is entitled to a defense under Section 10 of the Portal-to-Portal Act, 29 U.S.C. 259, because, he alleges, he undertook his pay practices believing them to be lawful. Petitioner has waived that claim by failing to raise it below. In any event, Section 10 of the Portal-to-Portal Act does not apply to this case. Section 10 absolves an employer for liability for acts or omissions that he demonstrates were in "good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" by the Administrator of the Wage and Hour Division of the Department of Labor. However, as we have explained, the Department's regulations supply no basis for a defense of reasonable good-faith reliance here, but instead make clear that an employer who makes deductions from employees' wages to reflect partial-day absences cannot claim that those employees are professionals paid on a "salary basis." Petitioner does not identify any written opinion of the Department

upon which he claims to have relied in making such deductions while withholding the overtime compensation required by the FLSA.

4. Finally, petitioner's unfocused discussion (Pet. 25-26) of the Secretary's "window of correction" regulation presents no issue warranting review. The district court gave petitioner the opportunity to take advantage of the window of correction and to avoid liability for overtime compensation by reimbursing his employees for the partial-day deductions he had made and by promising to comply with the FLSA in the future. The district court imposed liability only after petitioner failed to reimburse his employees for the deductions, as petitioner concedes. See Pet. 6 n.2. The court of appeals affirmed on the ground that petitioner's failure to repay the wages he had deducted supplied a valid basis for closing the window of correction and for imposing liability for the unpaid overtime wages. That is the only ruling below relating to the window of correction that adversely affected petitioner, and he does not seek review of it.[11] Thus, no question pertaining to the window of correction is suitable for review by this Court.

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[11] In the court of appeals, the Secretary argued that the district court's ruling could be upheld on the alternative ground that, because petitioner had not made deductions inadvertently and because petitioner did not otherwise pay the employees in question on a salary basis, he was not entitled to take advantage of the window of correction. Gov't C.A. Br. 29. The court of appeals did not reach that issue, however, because it held that the district court had properly "removed" the window of correction when petitioner failed to correct his pay practice by reimbursing his employees for past deductions. Pet. App. A7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-1823

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM G. PIERCE, P.E.,
Petitioner,

v.

ROBERT REICH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Pierce and all private sector employers have been denied "equal protection" because of the Department of Labor's approval and issuance of an exemption to all state and local governments from the "salary basis" requirement governing partial day deductions from salaried exempt employees, while holding private employers liable to a rigid interpretation of labor regulations.

II.

Whether the issue of partial day deductions and the "salary basis" test for otherwise salaried exempt employees, as interpreted by the Department of Labor and the courts, is contrary to the plain language of the governing regulations and the surrounding text.

III.

Whether the Portal to Portal Act of 1947, 29 U.S.C. §251 *et seq.*, enacted by the 80th Congress provides protection for the employers, who acted in "good faith", from liabilities concerning otherwise salaried exempt employees that have received "partial day deductions" and are, per the DOL's interpretation of the labor regulations, automatically converted to hourly non-exempt employees by sole virtue of the partial day deductions.

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p. 45825 6
57 Fed. Reg. 37672 (1992) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1823

WILLIAM G. PIERCE, P.E.,
Petitioner,

v.

ROBERT REICH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

The following represents the Petitioners response to the Brief in Opposition and incorporates the statements that Pierce contends are misleading. The organization of this reply brief follows that which was used in the opposition brief so the reader can follow the allegedly misleading statements and arguments.

STATEMENTS

In Statement 1, the Secretary so aptly points out that the regulations "further provide in a subsection commonly referred to as the 'window of correction' that an employer who has improperly deducted pay from an employee to reflect partial day absences may be given an opportunity to repay the deducted amount in order to restore retroactively the employees professional status." Yet, as testified in the trial court, Pierce requested to exercise such an option three times and was denied early resolution by counsel for the Secretary. The request came as early as a face to face meeting in November 1988, again during a court ordered mediation hearing when counsel responded that he "wanted to walk away with more money than the window of correction would afford", and once more by letter in January of 1992 which garnered the same response. Given that the "window of correction" is §541.118(a)(6) of the regulations governing professional, administrative and executive employees, Pierce should not have had to bear the cost and disruption to the business to win such a right in district court.

In Statement 2, the Secretary points out that Pierce's employees were paid a set amount that "was reduced when, for personal reasons, the employees worked less than a day." Yet counsel for the Secretary failed to point out that the 105 hours of deductions were made when work was available but the employee was not "ready, willing, and able to work" (§541.118(a)(1)) due to pursuit of recreational activities, and chose not to (1) charge the time to accrued leave as acceptable to the Secretary of Labor, or (2) make up the time missed commensurate with their salary at their own convenience.

In Statement 3, the Secretary gives an abbreviated yet concise timeline of the actions of the court below. However, Counsel for the Secretary failed to acknowledge that Pierce had offered to "open the books to an auditor of the Court" to substantiate his claim of temporary inability to pay. When an environment has been built to support thirty employees yet is being supported by a remaining two it is quite obvious that a very

difficult financial situation exists[1]. In addition to the offer stated above, Pierce filed with the court below the cover pages of the foreclosure proceedings on his family's home and the business's office building, eviction notice of the Louisville office, and repossession notice of a significant portion of the furniture and equipment in the Cincinnati and Louisville offices. The Secretary never objected to those documents; the authenticity of those documents has never been challenged.

In Statement 4 the Secretary points out that the court below rejected Pierce's claim that "a day" is not defined in clear definitive terms for the reasonable person by quoting the 6th Circuits decision stating that the term "day" refers to the "standard, eight hour day." Counsel for the Secretary failed to note that such a definition given by the court below would preclude an employer/employee arrangement of four ten hour days constituting a workweek and is contrary to the Secretary's own position that a "day" means "the employees customary work day, whatever number of hours that may be." (See Gov't. C.A. Br.24) If conflict exists in the meaning of a "day" between the DOL's position and the 6th Circuit's decision, it is entirely understandable that the "reasonable person" can construe an alternate meaning of the undefined phrase when applied to today's jargon and in today's workplace environment.

ARGUMENT 1 - "equal protection"

The Secretary states in the 1st Argument that Pierce did not raise the issue of private employers being held to a more restrictive definition of "salary basis" than that of public employers and that the court below did not decide the issue. Yet in footnote 7 (Resp. 8), the Secretary states "petitioner argued that the more lenient definition of 'salary basis' used in the public employee context made 'common sense', and argued that the same standard should apply to the employees of private employers." It

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[1] Pierce requested of the trial judge in the Fall of 1992 for additional time in which to reimburse the former employees for the deducted hours in order to sell his family's residence and raise the necessary funds. See Pet. 6 n.2.

is axiomatic that a party cannot make a court decide an issue. The most a party can do is present the issue. As the Secretary recognized in footnote 7, the issue of disparative treatment between public and private employers was in fact presented. The Secretary is also correct that the court below did not issue a ruling on the argument and is the specific reason why the issue of "equal protection" is ripe for review by this Court.

Furthermore, this Court has ruled that "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them, and orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel v. Helvering,* 61 S.Ct. 719 (1941). "The general rule that an appellate court does not give consideration to issues not raised below should not be applied where the obvious result would be a plain miscarriage of justice." *Id* at 719[2].

The next point the Secretary attempts to make is that "petitioner's conduct occurred prior to the Secretary's adoption of a different 'salary basis' test governing public employers ..." and "... thus has no standing to challenge in this lawsuit the distinction presently drawn by the Secretary between employees of public and private employers." The argument is predicated on the fact that the Final Rule, making such a distinction, was not adopted until August 14, 1992. However, the DOL announced on January 9, 1987, that the agency would "not enforce the 'no partial-day deduction' rule against state and local governments in discrete circumstances." *Federal Register* Vol. 56, No. 173, p.45824. The directive was issued just seven days prior to the Department's release of 29 CFR 553 Application of the Fair Labor Standards Act to Employees of State and Local Governments, Final Rule in which it states

> (c) Section 13(a)(1) of the Act provides an exemption from both the minimum wage and overtime pay requirements for any employee employed in a bona fide executive, administrative, professional, or outside capacity,

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2 Citations as written in Headnotes 5 and 6.

> as these terms are defined and delimited in Part 541 of this title. An employee will qualify for exemption if he or she meets all of the pertinent tests relating to duties, responsibilities, and salary. *Federal Register* Vol. 52. No.11. p.2038 (emphasis added).

Thus in one week the DOL states that (1) public employees must meet "all of the pertinent tests ... salary" and (2) they will not enforce the partial-day component of the salary basis tests for public employers and their employees. Moreover, the "non-enforcement" policy directive was in direct conflict with the FLSA's application to public employees as required by the Fair Labor Standards Amendments of 1985 (Public Law 99-150). The January 16 Final Rule (29 CFR 553) was a correct interpretation of "holding public employees to the 'salary basis' test", but then the DOL eviscerates that requirement through the non-enforcement policy. The "non-enforcement" policy established a basis to make a distinction between public and private employers, thus the eventual denial of "equal protection" for the private sector employees and employers.[3]

The Secretary continues within the first argument to state that such a distinction has a "rational basis" and is within the scope of the agency's power, as established by Congress, to "define and delimit" the terms of professional / executive / administrative positions. Counsel supports their theory that the distinction is right and rational, and comports with equal protection principles by citing this Court in *McGowan v. Maryland,* 366 U.S. 420, 425 (1961), "[a] classification that treats some groups differently from others, but is not based on suspect classification and does not affect fundamental rights, is valid if it has a rational basis." What "rational basis" exists if such an exemption is in direct conflict with the explicit Congressional intent in amending these statutes so that it specifically applies to public and private employees alike? What "rational basis" exists if

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[3] Also note that this date occurs in month six of the twenty-four month period that the Pierce audit covers.

such an exemption is in direct conflict with the Departments own interpretation of Congressional intent?

The respondent's brief also curiously directs the Court to a prior decision *Tony & Susan Alamo Found. v. Secretary of Labor,* 471 U.S. 290, 306 n.32, (1985). In that decision this Court decided that an employers activities were not beyond the reach of the FLSA, and "...its associates are 'employees' within the meaning of the Act because they work in contemplation of compensation. Like other employees covered by the Act, the associates are entitled to its protection." *Id* at 306. Are the employees of State and local governments not working "in contemplation of compensation", and should they not be afforded "[FLSA] protection"? After all, if the DOL interprets Congressional intention to disallow partial-day deductions for private employers and employees, and Congress has applied the FLSA, including Section 13(a)(1) exemption for Professional, Administrative, and Executive employees to all State and local public employers, as reported by the DOL in the Final Rule dated January 16, 1987, does that not say that the DOL is developing regulations that do not comport with Congressional statutes?

The Secretary then relies on the argument that the "unique nature of public employment" justifies the salary test exemption given only to public employers. However, this Court has ruled that such a uniqueness does not exist, even when applied to "traditional" functions of government. See *National League of Cities v. Usery,* 426 U.S. 833 (1976); and *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985).

The final justification the Secretary attempts to use in explanation of the "rational basis" is that public employers are subject to "principles of public accountability" and as such can not be paid for times when not working. Counsel for the Secretary seeks to paint the picture that the only reason for adoption of the Final Rule granting an exemption to public employers was due to such reasoning that some State and local statutes preclude a public employee from being paid when not working.

A review of the Interim and Final Rules provides more than the single explanation to avoid conflict with local and state regulations. It provides great concern as to "the exposure of governmental employers to potentially enormous and generally unexpected back wage liabilities to employees.... Such unforeseen liabilities could seriously threaten the fiscal integrity of State and local governmental agencies, and could seriously disrupt widespread pay practices...." *Federal Register* Vol. 56, No.173, p.45825.

Further insight can be made into the Department's motives by looking at the regulatory history of the "salary test" pertaining to public versus private employers. The initial "salary test" exemption adjustment was the "non-enforcement policy" made public in January of 1987 for the "discrete circumstances" where applicable State or local law prohibits payment for such absences which are not covered by paid leave. If the "rational basis" was and still is solely to avoid conflict with existing statutes, the DOL could have stopped with such a change in regulation. However, the Agency went several steps further within the Final Rule by applying the exemption to <u>all</u> public employers without regard to whether local or State laws requires such an action. Furthermore, the Secretary provided an exemption for "deductions due to budget- required furloughs." Such action is in total conflict with the regulations §541.118(a)(1) wherein it states "[a]n employee will not be considered to be on a 'salary basis' if deductions ... are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly if the employee is ready, willing, and able to work, deductions may not be made...", and goes beyond the stated need to comport with the issue of "public accountability" for State and local government statutes.[4]

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[4] An additional indication that the decision to grant an exemption to the "salary test" for public employees was for "cost" reasons rather than the stated compliance with State and local statute requirements can be seen in the Secretary's cross-appeal in the *Mueller v. Reich* case decided by the 7th Circuit:

> "The Department's reason for wanting to cross-appeal is that it is distressed by the district court ruling that the new regulation, though valid as far as it goes, should have gone further and exempted public employees

Whereas the Secretary attempts to paint the picture that the granting of the rule change for public employers and employees was in an effort to comport the new interpretation with State and local statutes, subsequent actions show that economic issues quickly became the overriding concern. "But there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perceptions of costs and benefits." *Alabama Power Company v. Douglas M. Costle*, 636 F.2d 323, 357 (D.C. Cir. 1979). Therefore, to be valid the change must be consistent with the FLSA's purpose and not contrary to the statute. Furthermore, given that Congress and this Court have included all public employees under the umbrella of the Act, the consistency of the rule change must apply to all employees covered, including both public and private.

The Secretary continues with the opposition that the regulation change is "...clearly a valid exercise of the broad rule making authority granted to the Secretary...." See Resp. 12 n.10. In relying on *Batterton v. Francis*, 432 U.S. 416 (1977), the Secretary overlooks two key points made therein: (1) "...administrative interpretations of statutory terms are given important but not controlling significance..." *Id* at p.424; and (2) "[v]arying degrees of deference are accorded to administrative interpretation, based on such factors as the timing and consistency of the agency's position...." *Id* at p.425. What effect does "timing" have on the Department's interpretation when the "general requirement that an exempt employee be paid on 'a salary basis'

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from the disciplinary limitation in the salary-based regulation as well as from the prohibition against pay deductions for missing part of a day's work.... That is precisely the ground of the Department's appeal here, as its lawyer acknowledged at the argument." *Mueller v. Reich*, 54 F.3d 438, 441 (7th Cir. 1995).

The court did acknowledge the validity of the Department's rule change for public employees, but was not asked to address, and did not address, whether the rule should be applied to private employers as well. The court did raise the possibility when stating "[i]t might be possible to question the rationality of the rule with respect to *all* employees, private as well as public..." Id., 54 F.3d at 443.

has been an integral part of the regulations since 1940, and 29 CFR 541.118 ('salary basis') and has remained essentially unchanged since revisions were last made in 1954." *Federal Register* Vol. 57, No. 161 p. 37672 n.11. Yet litigation against private employers with regard to §541.118(a)(2) did not surface until the mid 1980's. The oldest caselaw dealing with partial-day deductions for personal reasons that the Department has used in its litigation against Pierce is 1990 for an audited period of June 1986 to May of 1988! Furthermore, what effect does "consistency" have when the DOL ignores a phrase within the regulation for over 45 years, then litigates against public employers interpretation, then issues a "non-enforcement" policy seven days prior to its granting the Final Rule extending full FLSA coverage to public employees, and finally without notice commenced enforcement against private employers?

To summarize, this Court held in *Garcia* that there was no impediment to having the FLSA apply to public employees. Congress then amended the FLSA so that it applied equally to public employees as well as private employees. Then the DOL decided to circumvent the amendment by providing an exemption from the "salary basis" test for "professional / administrative / executive public employees. That exemption is not only disparative treatment but also is beyond the DOL's regulatory authority.

ARGUMENT 2 - "a day or more"

In the Secretary's second argument, Counsel relies on three decisions to support the claim that partial day deductions are not permissible. However a review of all three will show that none of them dealt with the issue of a partial day deduction due to an absence for personal reasons and at a time when work was available but the employee was not "ready, willing, and able to work". Furthermore, none of the cases involved an employment arrangement that would have allowed the application of accrued leave to cover partial day absences as is acceptable by the DOL and as Pierce's policy allowed.

Klien v. Rush-Presbyterian-St.Luke's Medical Center, 990 F.2d 279 (7th Cir. 1993), involved partial day deductions for disciplinary reasons because of rules and safety infractions, thus a violation of §541.118 (a)(5), and not because partial day absences for personal reasons.

Donovan v. Carls Drug Co., 703 F.2d 650 (2nd Cir. 1983), differs from Pierce's case in that it dealt with a willful violation of the regulations, and a judgement against the employer was entered when the employer failed to timely defend his actions. Furthermore, Carls had been audited on eight separate occasions and found to be in violation five times. In contrast, the compliance officer testified at the trial court that a subsequent audit of Pierce found him to be in total compliance.

Michigan Ass'n. of Government Employees v. Michigan Dep't. of Corrections, 992 F.2d 82 (6th Cir. 1993), is not directly applicable to Pierce in as much as it involves a public employer that was covered by the 1992 Final Rule "salary basis" test exemption. The case does support Pierce's position that the phrase "a day or more" may allow partial day deductions without affecting the salary exempt employee status, and poignantly shows that confusion and conflict over partial day deductions does indeed exist. In the Michigan case, the court ruled that "[s]ick leave policy ... authorizing compensation reductions for absences of less than one day, did not jeopardize status of supervisors as salaried employees exempt from overtime requirements...."; yet in the decision involving Pierce in the case below it did jeopardize such status. Given that the exemption for absences due to sickness, as written in the regulations §541.118(a)(3), utilizes the same requirement of "a day or more" as does the exception for personal reasons §541.118(a)(2), the 6th Circuit has on one hand ruled that "a day or more" allows for deductions of less than a day when dealing with sickness yet on the other hand rejects a similar position when dealing with absences occasioned for personal needs, such as a round of golf.[5]

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[5] Such a conflict raises numerous issues and questions in what a "day or more" means and when are partial day absences allowed and when are they disallowed. Does the sickness exemption only apply to the employee or will

The Secretary continues the argument that there is no confusion as to what constitutes a "day" as the "...Secretary has interpreted that term, consistent with its ordinary usage, to mean the employee's customary work day, see Gov't C.A. Br. 24-26, and the court of appeals likewise recognized that the term to connote 'the standard eight-hour day," Pet. App. A5." Such a conflict of interpretations leaves an employer in a real quandary when considering four 10 hour days as a normal workweek. It would appear that a deduction of two hours would comport with the 6th Circuit, yet be forbidden by the Secretary.

ARGUMENT 3 - Portal to Portal Act

In Argument three, Counsel for the Secretary argues that Section 10 of the Portal-to-Portal Act does not apply and that the bar to liability and penalty for "good faith" reasons is not applicable since Pierce did not prove his actions were indeed done in "good faith." Pierce's reply need only restate what the trial judge found as a matter of fact in the original decision: "...[Pierce] intended to pay his employees on a 'salary basis', intended to operate within the letter and spirit of the Act, and sought to treat and pay his employees in a manner that was professional, considerate and equitable." Pet. App. C8. In addition, when Counsel for the Secretary withdrew the "willful and purposeful violation" claim at the trial court just prior to opening statements, he was acknowledging that the omission was done in "good faith". After all, if not "willful" and not "purposeful" then "good faith" must be the situation, and one of which the Secretary conceded.

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the illness of a child apply if the employee leaves to provide transportation to the doctor or hospital? Furthermore, is the sickness strictly limited to physical illness or does mental stress or tension also apply? If so, does a relaxing therapeutic hour spent fishing in order to relive the stress and tension qualify or does the employee have to go to the doctor or home? How is the employer to monitor the employee's actions after he/she leaves work? How many of the 105 deducted hours in the case against Pierce can be attributed to sickness? Regardless of the answers to the hypothetical questions posed above, the 6th Circuit has developed two totally differing decisions relating to the interpretation of "a day or more", both of which are contrary to the Secretary's and thereby extending a considerable amount of confusion into understanding the term "a day or more" for a reasonable person.

Congress was very clear in the Portal to Portal Act of 1947 that businesses would be ruined (as happened to Pierce) if they were subject to liabilities for violations of the FLSA when their was a "good faith" attempt to comply. If the Secretary is correct that Pierce employees where not salaried exempt, then the Portal to Portal Act's preclusion from liability for "good faith" compliance bars the DOL's action against Pierce. Either the employees were salaried (in which case there is no liability) or the salaried exemption was lost even though there was a "good faith" attempt to comply (in which case the Portal to Portal Act provides a complete defense)[6].

ARGUMENT 4 - "window of correction"

In Argument 4, the Secretary presents a discussion of the "window of correction" that is in direct conflict with his own previous statements. See Resp. 3-4 and 16 n.11. In the Statement 1, the position leads the reader to believe that the "window of correction " is relatively a matter of fact that Pierce could and should have exercised. Further, "... that an employer ... may be given an opportunity to repay the deducted amount in order to restore retroactively the employee's professional status." Yet as shown in the footnote (see Resp. 16 n.11), the Secretary acknowledged his opposition to the award of the window of correction to Pierce because "...petitioner had not made deductions inadvertently and because petitioner did not otherwise pay the employees in question on a salary basis, he was not entitled to take advantage of the window of correction."

The Secretary is again ignoring the precise wording of the window of correction by omitting "... or for reasons other than

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[6] PORTAL TO PORTAL ACT OF 1947 (29 U.S.C. §251)

"SECTION 10 Reliance in Future on Administrative Rulings, etc.

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on the account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 ... if he pleads and proves that the act or omission complained of was in good faith ..." See also Pet. 27-33 and D1-D2.

lack of work..." after the exception for inadvertent deductions. Furthermore, Counsel argues that the employees were not otherwise paid on a salary basis; yet, the Secretary acknowledges that all other aspects of the salary tests were met. If the sole issue of partial day deductions removes an employer from the salary test, then the window of correction becomes meaningless.

CONCLUSION

The issue at hand involves one dealing strictly with salaried employees working in an executive, professional and/or administrative positions. As the Department of Labor has pursued litigation in this arena they have very carefully crafted their approach under the title of "pay-docking" and as such created a very negative connotation. The real issue is whether salaried employees have the right to work within a flexible system and establish their hours of effort commensurate with their salary within a time frame convenient to them and their families.

The working environment today has changed considerably from that of the 1940's when the "salary basis' test was originally established. The personal and family needs of the semi-retired professionals, the two income family, or the single working mother or father not only requires, but demands, flexibility within the working hours.[7]

Whereas this litigation began in 1988 as a single case of the DOL versus a private employer, the implications of a review by this Court will affect nearly every employer and employee in the nation. While the DOL has provided the relief from the threat of "potentially enormous and generally unexpected back wages ... [that] could seriously threaten the fiscal integrity of State and local government agencies....", private employers have faced rigorous enforcement and are deserving of the same "equal protection" from fiscal ruin. Furthermore, the exemption given to public employers has enabled their employees to benefit from the resulting flexible leave arrangement -- an "equal protection" that must be afforded their private employee counterparts.

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[7] Appendix A is the Congressional testimony of a "single parent."

APPENDIX A

Written Testimony of Phyllis G. Diosey, Ph.D.
Prepared for the
Committee on Economic and Educational Opportunities
U.S. House of Representatives
Subcommittee on Workforce Protections
March 30, 1995

Introduction:

My name is Phyllis Diosey. I am employed as a Senior Air Quality Specialist with Malcolm Pirnie, Inc. an environmental engineering firm in White Plains, New York. I am also the mother of Alyssa Kate, who is 12 years old. My husband died when Alyssa was a year old, and since then, I have been working to support both of us.

Discussion:

As a professional scientist employed by one of the nation's leading environmental consulting firms, my primary responsibility is to get my job done properly, on time and within budget. As a mother and single parent, my responsibility is to raise my daughter and provide her with the best opportunities I can. Trying to accomplish both of these jobs takes a lot of juggling and creative time management. I feel very fortunate to work for a company like Malcolm Pirnie that goes out of its way to help me accomplish both of these goals by allowing me flexibility in my work schedule.

I explained this need for flexibility in a letter which I wrote in 1993 to John Foster, Chairman of the Board of Directors at Malcolm Pirnie. Occasions do arise, such as illness, school holidays, snow days and school delay days, when I have no choice but to take charge of my daughter during routine working hours. These occasions often occur when the workload is such that I cannot simply write off the day. So I shift hours, bring work home when I can, or bring my daughter to work when I can't be out of the office. I think that this is fairly typical of the balancing

act that many working parents perform today. I am very grateful that Malcolm Pirnie has supported me in this. Other parents, especially working women who still shoulder most of the responsibility as caregivers, are not as lucky, and may be penalized for trying to cope with the realities of modern life.

Let me explain the background of a Malcolm Pirnie flexible leave practice that brings me here today to testify.

Back in June of 1988, I charged four hours of my time to unpaid absence on my time sheet. I was told later that charging this four hours to unpaid leave led to my being designated by the Department of Labor as an "hourly" worker for about a two year period of time. I really don't remember why I needed the time off in 1988. I would guess that, by the time of year, it was related to school. My daughter was in kindergarten at the time. Having worked at Malcolm Pirnie for a little more than a year, I was entitled to only two weeks of vacation. I voluntarily took unpaid absence rather than use any of my vacation or other leave time. Anyone who depends upon organized childcare, as I do, knows that there are times of the year, such as the week after school closes, or the week or two before school opens in September, when many childcare centers are closed. Because of this, vacation time becomes more than just the chance to spend an extended length of time with your children; it becomes an absolute necessity to fill the gap between daycare and school. Since I wanted to save my leave time, I chose to charge this four hour increment to the "leave without pay" account. I work hard at my job and take pride in what I do. I expect <u>fair</u> compensation for my work, not a "free lunch" from my employer. At Malcolm Pirnie, this philosophy appears to be mutual since my employer still voluntarily pays me additional compensation on a "straight time" basis for hours I work in excess of forty.

In the *DOL v. Malcolm Pirnie* case, I understand that a few other professional colleagues also chose to charge some of their time off to this account. I am advised that the sum of all part-day "leave without pay" deductions amounted to about $3300 for 24 employees over a two year period. According to my

employer, these deductions totaled about 100 hours out of more than one million hours worked during the same period. When Malcolm Pirnie became aware that such deductions were prohibited by law, they voluntarily reimbursed me (and the other employees) and clarified the company policy to prevent future deductions of this kind. I was latter told that the effect of those part-day deductions, according to the Department of Labor (DOL), converted all employees in my class (about 400) from salaried professional to "hourly" workers who must be paid time and one-half for any overtime worked. As a result DOL sought additional overtime compensation for about 400 highly skilled and well compensated professional engineers, scientists and the like for a 19 month period. The total additional compensation (including interest) amounted to approximately $875,000.00. This Draconian "all or nothing" approach by DOL led to financial hardship for my employer and unexpected payments to employees who never sought additional compensation. In the end, the employees of Malcolm Pirnie have lost flexibility. In the wake of conflicting court cases, the firm was forced to change its leave policies for exempt employees as follows:

- Employees must use their sick leave in full day increments.
- Employees are not permitted to request time off without pay in part-day increments.
- Employees must use their vacation leave in full day increments.

Quite simply, the flexibility which I need has been limited.

Some other points are also in order.

Apparently when it developed the regulations under the Family Medical Leave Act, DOL recognized the need for exempt employees to take part-day unpaid leave to handle family and medical obligations. However, I am advised that this type of FMLA Leave is extremely limited by the law and its regulations, and small firms who adhere to the principles of the FMLA would violate the FLSA. In addition, the Department of Labor has chosen to exempt certain professionals such as doctors, lawyers and computer professionals (but not other professionals such as architects, engineers or accountants) from its prohibition against

part-day unpaid leave. These distinctions do not make sense to me.

Regarding time sheets, in our case DOL cited the fact that we record hours on a time sheet as an indication that we are hourly employees. However, I do not regard myself or my colleagues at Malcolm Pirnie as "hourly" workers simply because we fill out time sheets. Time sheets are the only way a consulting firm has to track the time spent on each job. At Malcolm Pirnie, we have engineers, scientists, architects, draftspersons, and other specialists that make up our project teams. When we get a request for work from a client, one of the first things that the client wants to know is how much will it cost? We cannot bill our clients the same fee for each job because each job is different.

In most cases as a professional consulting firm, we must account to our clients for each work hour. In addition, the majority of my employer's clients are state, local and federal government agencies. Ultimately we are accountable to the public for the time we spend on these projects. This "public accountability" rationale is reflected in the stringent cost accounting standards that apply when we preform work for public entities. These standards specifically prohibit paying employees for time not worked! However, when we follow the Department of Labor mandate to charge such time as paid leave, we increase our overhead rates, incurring potential objections from government contract auditors as well as from our clients. It is also my understanding that, based on this same "public accountability" rationale, DOL has decided to exempt public employees from the regulations we are discussing today. However, Malcolm Pirnie who is subject to this same accountability is not exempt from these regulations. Again, I don't understand the distinction.

Finally, in some organizations the loss of "salaried" status has a significant impact on the availability of employee benefits. While this is not the case at Malcolm Pirnie, I am concerned that the loss of exempt status may result in a reduction of employee benefits available (especially medical benefits) to other persons

having circumstances similar to me and who have the most need for such benefits.

CONCLUSION:

I think the security, career growth and future of every employee is linked with the successful operation and financial health of the company that they work for. The salary I am paid fairly takes into account my professional status. I should be free to decide with my employer, a mutually acceptable arrangement regarding my work situation without government intervention or restrictions upon that flexibility. The regulations should be modified to protect my rights as a professional employee while allowing employees and employers the flexibility to cooperatively arrange work schedules that result in high productivity and competitiveness. Moreover, I also know that the phrase "protecting employee rights" in today's world has many more dimensions than it did when my mom and dad entered the work force in the 1930's. For a standard to be fair today, it should permit flexibility for both the employee and employer. Under the current system, there appears to be little leeway for either group. The present approach puts professional working mothers especially at risk because the rigid standards make these women appear less productive and less attractive as employees, jeopardizing their future in the workplace. I hope that you will be able to modernize the laws that govern the workplace so that they truly reflect today's workstyles and lifestyles.

I thank you for allowing me to speak to you today.